No. 90-89-CFX
Status: GRANTED

Title: International Primate Protection League and its Members, et al., Petitioners
v.
Administrators of Tulane Educational Fund, et al.

Docketed:
July 12, 1990

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Woodward,Margaret E.

Counsel for respondent: Weiss,Gregory C., Solicitor General, Brenner,Edgar H.

Entry	Date	Note	Proceedings and Orders
1	Jul 12 1990	G	Petition for writ of certiorari filed.
3	Aug 8 1990		Order extending time to file response to petition until September 14, 1990.
4	Aug 8 1990		The above extension applies to all responents.
5	Sep 14 1990		Brief of respondent National Institutes of Health in opposition filed.
6	Sep 19 1990		DISTRIBUTED. October 5, 1990
7	Oct 1 1990		Response requested of non-federal respondents 10/1/90. Due 10/31/90 (BRW).
8	Oct 31 1990		Brief of respondent Administrators of the Tulane Educational Fund in opposition filed.
9	Oct 31 1990		Brief of respondent Institutes for Behavior Resources in opposition filed.
10	Nov 7 1990		REDISTRIBUTED. November 21, 1990
11	Nov 26 1990		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
13	Dec 21 1990		Record filed.
		*	Certified copy of C. A. Proceedngs received.
12	Dec 26 1990		Record filed.
		*	Certified copy of additional proceedings received.
14	Dec 26 1990		Record filed.
		*	Certified copy of original record received.
15	Jan 9 1991		Brief of petitioners Intl. Primate, et al. filed.
16	Jan 9 1991		Joint appendix filed.
17	Feb 1 1991		SET FOR ARGUMENT WEDNESDAY, MARCH 20, 1991. (1ST CASE)
18	Feb 8 1991		Brief of respondent Institutes for Behavior Resources, Inc. filed.
19	Feb 11 1991		Brief of respondent National Institutes of Health filed.
20	Feb 13 1991		Brief of respondent Administarators of the Tulane Educational Fund filed.
21	Feb 21 1991		CIRCULATED.
22	Mar 12 1991	X	Reply brief of petitioners International Primate Protection League, et al. filed.
23	Mar 20 1991		ARGUED.

NO. 90-89

Supreme Court, U.S.
FILED
JUL 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS
Petitioners

V.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit properly ruled that a federal **agency** may remove to federal court a non-federal action brought against it in state court. 28 U.S.C. Sec. 1442 provides that an action against an **officer** is removable and there are conflicting decisions from other circuits that a suit against a government agency, as distinguished from a suit against a federal official, is not removable under this section.

2. Whether the Fifth Circuit properly ruled that the National Institutes of Health had sufficient interest in this action to remove it to federal court, based on the NIH's untested assertions of interest and without allowing the discovery ordered by the district court on this issue to proceed.

3. Whether the Fifth Circuit properly ruled that animal protection groups lacked standing to proceed with their state law claims without consideration of the nature and sources of the claims asserted.

LIST OF PARTIES

1. International Primate Protection League and Its Members - Petitioner

2. People for the Ethical Treatment of Animals and Its Members - Petitioner

3. Alex Pacheco - Petitioner

4. Louisiana in Support of Animals and Its Members - Petitioner

5. Administrators to Tulane Educational Fund - Respondent

6. National Institutes of Health - Respondent

7. Institutes for Behavior Resources, Inc. - Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS

Petitioners

V.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, International Primate Protection League and its Members, People for the Ethical Treatment of Animals and its Members, Alex Pacheco, and Louisiana in Support of Animals and its Members, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Fifth Circuit, entered in the above-entitled proceeding on March 8, 1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *International Primate Protection League v. Administrators of Tulane Educational Fund, et al*, rendered on March 8, 1990, is reported at 895 F.2d 1056, and is set forth in the Appendix at A-1 through 16.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1990. (A-1). The order denying a petition for rehearing was entered on April 13, 1990 (A-24). This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1). However, because the jurisdiction of the lower courts is subject to question, See Issue *I., infra*, this Court's jurisdiction (except to decide the jurisdictional question) is necessarily at issue as well. *cf., Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165 (1934).

STATUTE INVOLVED

28 U.S.C. Sec. 1442(a)(1) provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them. . .
>
> > (1) any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT OF THE CASE

This case arises out of the spirited debate surrounding the "Silver Spring Monkeys", former research animals whose release the animal protection community has sought since 1981, when the experiments to which they had been subjected were terminated for unjustifiable cruelty. The experiments had been conducted by a private research facility, the Institute for Behavioral Research ("IBR"), under a grant from the National Institutes of Health ("NIH"). Maryland police raided the laboratory, seized the monkeys, and instituted a criminal prosecution of Dr. Taub, the principal investigator conducting the experiments.[1] The monkeys were initially turned over to some of the plaintiffs for safe-keeping, and later were delivered by them to NIH, pursuant to a court order vesting temporary custody of the animals in NIH during the prosecution of Dr. Taub. Long after the order expired, NIH retained custody of the monkeys with the consent of their owners, IBR.

From the time the animals were seized, the humane community sought to insure that they would not be further abused or needlessly destroyed. Animal protection groups sued to protect the monkeys' interests under the federal Animal Welfare Act, but were found not to have standing to enforce that statute. *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986).

---

1. Dr. Taub was convicted of multiple counts of animal cruelty. His convictions were later set aside because of questions concerning the applicability of the anti-cruelty statute to scientific research. *Taub v. State of Maryland*, 296 Md. 439, 482 A. 2d 819 (1983). The Maryland legislature later amended the statute to provide clearly for application to researchers. Md. Code, Art. 27, Sec. 59 (amended 1984).

In 1986, IBR and NIH revealed they had no scientific use for the animals, present or planned; and their release seemed imminent. More than 300 members of Congress petitioned NIH to turn the Silver Spring Monkeys over to an animal sanctuary. NIH promised members of Congress that the animals would never be experimented upon, that they would be resocialized, that their crippled arms would be amputated, and that they would not even be moved without advance warning. Shortly thereafter, NIH had the monkeys secretly transferred to the Delta Regional Primate Research Center, a branch of Tulane University of Louisiana. Within a year of the monkeys' transfer, columnist Jack Anderson exposed a plan to silence the ongoing controversy by killing the monkeys after transferring title to Tulane to spare NIH political embarrassment. In the uproar following this expose, five of the primates were moved to the San Diego Zoo. This litigation involves the four surviving Silver Spring Monkeys housed at Delta.[2]

From the outset, NIH's resistance to releasing the monkeys was predicated upon its aversion to strengthening the animal protection community, whose interests were, according to the NIH, inimical to those of the scientific community. NIH had difficulty maintaining its self-proclaimed role as defender of Science, however, because the Silver Spring Monkeys, by NIH's own admission, had no scientific utility. To cure this defect in its position, NIH declared in 1988 that it had unearthed a scientific experiment for which the monkeys were uniquely suited and from which important information allegedly could be gained. In December of 1988 NIH announced its intention to

2. When the litigation began, nine Silver Spring Monkeys remained. Five have died during the pendency of the suit. Three were subjected to NIH's lethal experiment on July 6, 1990 after courts denied petitions for emergency injunctive relief. See footnote 3, *infra*.

"euthanize" three of the monkeys and perform its planned experiments immediately.

The instant action followed close on the heels of NIH's announcement. Named as defendants were NIH; IBR, the monkeys' owner; and the Administrators of the Tulane Educational Fund ("Tulane"), the monkeys' custodian. Suit was filed in state court, asserting that there was no legitimate research interest to be pursued [3], that the plaintiff animal protection groups and their members would be seriously aggrieved by the destruction of the primates, that their destruction for improper purposes constituted a public nuisance, an intentional infliction of emotional distress, and a violation of public policy, all under Louisiana law; injunctive relief was sought to prevent the animals' killing and to transfer custody to the plaintiffs or members of Congress. (See Petition A-30*ff.*).

A temporary restraining order blocking the killings was issued immediately by the state court. Relying upon 28 U.S.C. Sec. 1442(a)(1), authorizing removal of an action against a federal officer, NIH promptly removed the case to federal court, whence a second TRO issued (A-16). Plaintiffs' motion to remand was denied (A-17), and defendants' successive motions to dismiss, on grounds of *res judicata*, sovereign immunity, federal preemption, and lack of standing were also denied, (A-17, A-18). Defendants appealed from the denial of their second motion to dismiss, and the

3. An action has been filed in the district court for the District of Columbia charging NIH with scientific misconduct in connection with the planned experimentation on the Silver Spring Monkeys. The court recently declined to issue a temporary restraining order prohibiting the euthanasia of three Silver Spring Monkeys. *Physicians Committee for Responsible Medicine, et al. v. Louis D. Sullivan, Secretary of Health and Human Services, et al.* case number 90-0084 (on the docket of the United States District Court for the District of Columbia).

Fifth Circuit, holding that plaintiffs lacked standing, ordered the case dismissed.

REASONS FOR GRANTING THE WRIT

1. THE FIFTH CIRCUIT'S RULING THAT NIH, A FEDERAL AGENCY, COULD REMOVE THIS NONFEDERAL ACTION TO FEDERAL COURT EXPANDS FEDERAL JURISDICTION BEYOND THE PLAIN LANGUAGE OF THE REMOVAL STATUTE, CREATES A CONFLICT IN THE CIRCUITS, AND DOES VIOLENCE TO STATE COURT ENFORCEMENT OF STATE LAW.

A. *The Removal Statute Did Not Authorize the Exercise of Federal Jurisdiction in This Case.*

The statute upon which defendant NIH predicates its petition for removal, entitled "Federal Officers Sued Or Prosecuted", provides in relevant part as follows:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following *persons* may be removed by them. . .
>
> (1) any *officer* of the United States or any agency thereof, or *person* acting under *him*, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. Sec. 1442 (emphasis added).

By its terms, the statute applies to suits against natural persons, not entities of the federal government. In subsection (a), the statute specifically states that an action

against any of the following listed "persons" may be removed. Further, in paragraph (1) the listed person is "any officer" of the United States or any agency thereof. The person may be an officer of the United States or of a United States agency; the right to remove is not given independently to "any agency". *See City of Alma v. Bell, Galyardt and Wells, Inc.*, 606 F.Supp. 686, 689-690 (D. Neb. 1985). That the statue refers to natural persons is emphasized by its statement that removal also may be accomplished by a "person acting under *him*," i.e. any officer. In *Lovell Mfg. v. Export-Import Bank of United States*, 843 F.2d 725, 733(3d Cir. 1988), the court said of this provision:

> We cannot read a statute to say what it does not say, and we think it plain from the punctuation of the sentence, and the use and placement of the word "him" that this statute merely allows removal by any officer. . . or person acting under him.

Lovell's reading, true to the statute's language, is also true to its purpose: to protect federal officers from being sued in state court for actions undertaken as part of their federal duties. As Justice Marshall explained in *Willingham v. Morgan*, 395 U.S. 402, 406-407, 89 S.Ct. 1813, 1815-1816 (1969):

> The federal officer removal statute has had a long history . . . The first such removal provision was included in an 1815 customs statute. It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular.

> It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act 'under color' of the statute. Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts.
>
> This provision, however, was not permanent, it was by its terms to expire at the end of the war.

While the present law broadens coverage to include federal officers other than those involved in the enforcement of the revenue laws[4], it was broadened to include only additional types of federal employees, not non-natural persons or entities. *Cf. Michigan v. Banning,* 88 F.Supp. 449, 450 (E.D. Mich. 1950). According to Professor Moore the 1948 revision made no change in the theory or basis for removal that the civil suit or the criminal prosecution must be against the officer or employee, and based upon an act or acts done under color of office. 1A *Moore's Federal Practice* Par. 0.164[1] at 382-384. Significantly, as stated by Moore, "a suit against a government corporation, as distinguished from a suit against a federal official or one acting under him, is not removable under Sec. 1442(a)(1)." *Id. See also Lance International Inc. v. Aetna Cas. & Sur. Co.,* 264 F.Supp. 349 (S.D.N.Y. 1967); *Harlem River Produce Co. v. Aetna Cas. & Sur. Co.,* 257 F.Supp. 160 (S.D.N.Y. 1965). In addition, a proceeding that is wholly *in rem* also is not removable. *Id.* See also, *New Jersey v.*

4. Significantly, the predecessor to paragraph 1 of Sec. 1442(a) was limited to revenue officers engaged in the enforcement of the criminal or revenue laws and those acting under or by their authority. 1A Moore's Federal Practice, 0.164[1] at 380-381.

Moriarity, 268 F.Supp. 546 (D. N.J. 1967).[5]

In *Willingham v. Morgan* this Court said that the amended statute was to be broadly construed "to cover all cases where **federal officers** can raise a colorable defense arising out of their duty to enforce federal law." 395 U.S. 402, 406-407, 89 S.Ct. 1813, 1815-1816 (1969) (emphasis supplied). In broadening the statute to include the right of removal by federal agencies, where, as here, no federal officers have been sued, the Fifth Circuit has gone too far. Its interpretation is in conflict with the statutory language and with the sound reasoning of the majority of jurisdictions that have taken the position that only federal officers can remove a nonfederal action.

B. *The Fifth Circuit Has Created a Split in the Circuits.*

A split of authority has arisen in the circuits concerning the proper interpretation of Sec. 1442(a)(1). The great weight of authority, citing the clear language of the statute and its legislative history, holds that a nonfederal action may be removed only by a federal **officer**, not by a federal **agency**, and would accordingly disallow the removal by NIH in the instant case. See, *Lovell Mfg., Div. of Patterson - Erie Corp. v. Export - Import Bank of United States,* 843 F.2d 725 (3d Cir. 1988); *C. H. v. American Red Cross,* 684 F. Supp. 1018 (E.D. Mo. 1987); *W-V Enterprises, Inc. v. North Kansas Savings Ass'n,* 628 F.Supp. 1261 (D.Kan. 1986); *C.H. v. American Red Cross,* 684 F.Supp. 1018, 1023 (E.D. Mo. 1987); *Woodward v. Turnage,* 646 F.Supp. 219,

5. Plaintiffs' petition for injunctive relief to prevent the senseless killing of the Silver Spring Monkeys closely resembles an *in rem* proceeding inasmuch as the petition raises questions and issues pertaining to the custody of the animals.

221 (E.D. Mo. 1986). *Gensplit Finance Corp. v. Foreign Credit Ins. Ass'n.* 616 F.Supp. 1504, 1509 (E.D. Wis. 1985). *Harlem River Produce Co. v. Aetna Casualty and Surety Co.*, 257 F.S. 160 (S.D. N.Y. 1960). *City of Alma v. Bell, Galyardt & Wells, Inc.*, 606 F.Supp. 686, 689-690 (D. Neb. 1985), citing *Brewer v. Department of Housing & Urban Dev.*, 508 F. Supp. 72, 74 (S.D. Ohio 1980); *Lowe v. Norfolk & Western Railroad Company*, 529 F.Supp. 491 (D. Ill.1982); *KCPO Employees Credit Union v. Mitchells*, 421 F.Supp. 1327 (D. Mo. 1976); *California v. Bozarth*, 356 F.Supp. 667 (N.D. Cal. 1973); *Lance Int'l Inc. v. Aetna Cas. & Sur. Co.*, 264 F. Supp. 349 (S.D. N.Y. 1967).

A small minority, led by the Fifth Circuit, holds that Sec. 1442(a)(1) is applicable to federal agencies. See decision below and cases cited therein; *Township of Middletown v. N/E Regional Office USPS*, 601 F.Supp. 124 (D.N.J. 1985); *Monal Construction Co. v. Brookside limited Partnership*, 539 F.Supp. 478 (W.D.D.C. 1982); *James River Apts. v. FHA*, 136 F.Supp. 241 (D.Md. 1955).

Because the majority view compels remand of actions removed by federal agencies, and because remand orders are not considered final orders reviewable by appeal, *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53, 96 S.Ct. 584, 593-94 (1976); 28 U.S.C. Sec. 1291, it is not surprising that the majority view is expressed principally by district court decisions. *Lovell Mfg., supra*, the only Circuit Court decision espousing the majority view, contains a thoughtful analysis of the statute's language and history, militating in favor of its application to federal officers alone. By contrast, the Fifth Circuit, the only circuit court subscribing to the minority view, adopted its position without articulating any basis for its decision. See ruling below, (A-12); *Smith v. City of Picayune*, 795 F.2d 482 (5th Cir. 1986); *IMFC Professional Servs. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 155-56 (5th Cir. Unit B 1982)

A writ should be granted to clarify whether 28 U.S.C. Sec. 1442(a) means what it says, and to eliminate the division among the circuits on this important jurisdictional issue.

C. *This Action Presents Issues of State Law That Are Within The Peculiar Province of Louisiana State Courts to Resolve.*

In *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), the plaintiffs, including some of the plaintiffs here, sued IBR, NIH and others in state court, seeking custody of the monkeys under Maryland law and seeking to enforce the federal Animal Welfare Act, 7 U.S.C. Secs. 2131 *et seq.* Presenting a federal question, the case was removed to federal court. The Fourth Circuit held that enforcement of the Animal Welfare Act was entrusted to the Department of Argiculture and that the plaintiffs had no standing to sue under that statue. Having thus dispensed with the plaintiffs' federal claims, the court declined to exercise pendent jurisdiction over the state law claims. Implicit in the court's ruling was its determination that 28 U.S.C. Sec. 1442(a) does not establish federal jurisdiction over any action brought against a federal agency, because NIH and the Department of Health and Human Services were defendants. As noted above, in making such a determination the Fourth Circuit was in the majority.

Anomalously, when plaintiffs reinstituted the purely state law claims the Fourth Circuit had referred to state court, NIH again removed to federal court. But because the monkeys had by then been transferred to Louisiana, plaint-

iffs filed suit in a Louisiana state court and the removal occurred within the Jurisdiction of the Fifth Circuit, one of the few in the country where such removal would be tolerated. Consequently, the claims that had been dismissed by the Fourth Circuit for want of jurisdiction were found to provide jurisdiction in the Fifth Circuit.

Plaintiffs argued below that the Fourth Circuit's ruling was *res judicata* as to the jurisdictional issue. While dismissals for lack of subject matter jurisdiction do not operate as adjudications upon the merits and thus do not preclude a second action on the same claim, at the same time, "**such dismissals do generally preclude relitigation of the underlying issue of jurisdiction.**" Wright and Miller, *Federal Practice and Procedure: Jurisdiction Sec. 4436. (emphasis supplied).* Hence, the Fourth Circuit's judgment that plaintiffs' state law claims against NIH were not cognizable in federal court "**remain[ed] effective to preclude litigation of the precise issue of jurisdiction that led to the initial dismissal**". *Id.* For example, in *Voisin's Oyster House, Inc. v. Guidry,* 799 F.2d at 188, the Fifth Circuit ruled that a dismissal on jurisdictional grounds would not bar further proceedings on the substantive claim in any court of competent jurisdiction but would preclude relitigation of the issue of federal jurisdiction. To the same effect is *Dozier v. Ford Motor Company,* 702 F.2d 1189, 1194 (D.C. Cir. 1983) (Scalia, J.), and *Stewart Sec. Corp. v. Guaranty Trust Company,* 597 F.2d 240, 241 (10th Cir. 1979) ("the principles of res judicata have been held to apply to questions of jurisdiction.")

The Fifth Circuit did not address the argument. Instead it asserted jurisdiction over state law claims that had been filed in what the Fourth Circuit had indicated was a court of competent jurisdiction. (And the Fifth circuit exercised jurisdiction for only long enough to dismiss plaintiffs' nonfederal claims, with prejudice this time, for lack of Article III standing, a requirement peculiar to the federal courts).

The Fourth Circuit's implied ruling was the correct one. The claims asserted here, grounded in Louisiana principles of public nuisance, tort, and equity, presented issues of state law. The primates at issue are privately owned and housed in a local facility. As shown below, the federal agency's interest is peripheral at best, raising further questions about the federal intrusion into this purely local matter. Moreover, as further shown below, plaintiffs would have had standing in state court to air their state court claims.

The Fifth Circuit, acting contrary to the language of the removal statute, the weight of authority and the ruling of the Fourth Circuit, exercised jurisdiction over state claims, only to dismiss those claims, which would have been cognizable under state law.

D. *The Fifth Circuit Improperly Usurped the Role of the District Court and Engaged in Fact-Finding in Ruling That NIH Had Sufficient Interest in This Action to Authorize the Exercise of Federal Jurisdiction.*

This court has admonished that "appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*" *Zenith Radio Corp. v. Hazeltime Research, Inc.,* 395 U.S. 100, 123, 89 S.Ct. 1562, 1576 (1969); *Cf.* Rule 52(a) of the Federal Rules of Civil Procedure. In this case, confronted with a serious factual dispute concerning NIH's interest in this matter, unresolved by the district court, which had ordered discovery on the issue, the Fifth circuit discarded this Court's admonition in order to find, on a tenuous factual record, that NIH was a proper party. In so doing, the Fifth Circuit trenched on the authority of the district court and upheld jurisdiction under extremely questionable circumstances.

When NIH announced the decision to "euthanize" three of the Silver Spring Monkeys in December of 1988, plaintiffs filed suit immediately. They named as defendants IBR, the monkeys' owner; Tulane, their custodian; and NIH, only because NIH had claimed responsibility for the decision. From the outset, however, plaintiffs questioned NIH's role in the proceedings. When NIH removed the case to federal court, plaintiffs moved to remand, both on the ground that Sec. 1442(a)(1) is inapplicable to a suit against a federal agency, see preceding section, and on the ground that NIH had insufficient interest in the case to justify the presence of a nonfederal suit in federal court.

On the interpretation of 28 U.S.C. Sec. 1442(a) the district court felt bound to follow Fifth Circuit precedent. On the question of NIH's interest in the case, however, the district court reacted with caution and concern. Interrupting NIH's benighted argument that plaintiffs had not proven jurisdiction (which plaintiffs were challenging), the trial court observed:

> . . .I am not sure that I have jurisdiction either. The problem that has been advanced to me consistently is the failure of the plaintiffs to be permitted to discover. We don't know why the government is in this suit, quite frankly. The government intervened,[6] but there are serious questions as to whether they even should have custody of these monkeys.

6. As counsel pointed out subsequently, the NIH had not formally intervened but had been named as defendant. However, at an earlier hearing, plaintiffs' counsel had proposed dropping NIH as a defendant, to which the NIH responded that it would simply intervene. The court's reference was to that discussion.

* * *

> I have denied the plaintiffs' motion to remand because nobody has advanced a reason to this Court whether their custody has not expired by some operating agreements or whatever agreements. I just felt that this Court was put in a position to attempt to rule on these motions when nobody had advanced anything to the Court.

(Hearing, May 3, 1989, pp. 5-6).

When counsel for the NIH made an unsubstantiated claim that NIH did have an interest, the Court responded:

> **You know, you say that, but no one has shown me one document that permits that.** I mean, you know, it's sort of like working in a vacuum. The government has not given me one document. **The only documents we have ever seen have shown that the Government's interest has long expired.** Now maybe there were some subsequent documents, I have never seen those. The government has refused — I shouldn't say refused, but they certainly have not done anything to show me that they have an interest in this case, and from what I can understand from Ms. Woodward, she has been attempting to get that information for a long time, even in other previous times, and has been unable to do so, so we have received nothing where this Court can definitely say that, sure, this document shows that the government does have an interest. We don't have anything. It has never been produced, never, to this Court.

(*Id.* at 15-16; emphasis supplied).

The court then ruled, and several times reiterated the discovery must go forward on the jurisdictional issue, the "very issue" to be placed before the Fifth Circuit on appeal and in case of remand, the "next issue before this Court." (*Id.* at 20, 25, 26, 27-28).

NIH refused to document its interest and refused to respond to plaintiffs' discovery requests relating to NIH's interest in the case, despite the firm commands of the trial judge. Instead, NIH appealed from the denial of its second motion to dismiss. (A-27). When plaintiffs noted that that was not an appealable order, NIH filed a novel pleading, styled a "motion for indicative ruling", in which it petitioned the district court to "indicate" whether it would grant a preliminary injunction if the issue were before it. At the hearing on this motion there was some question whether the court had jurisdiction to consider the bizarre request, in view of the pending appeal. However, NIH seized the opportunity to withdraw its prior consent to the extension of the TRO. It then appealed from the denial of its motion for indicative ruling, (A-29), arguing that the TRO had been converted into a preliminary injunction by the length of its duration, vesting in NIH the right to appeal from the issuance of a preliminary injunction. Contending that NIH was improperly manipulating the proceedings to secure an appeal on the merits of its procedural arguments without responding to discovery aimed at determining whether the federal courts had jurisdiction, plaintiffs filed a motion to dismiss the appeal. The motion was denied by the Fifth Circuit. (A-22).

Because of the pendency of the appeal, the district court opined that it had been stripped of jurisdiction to enforce its earlier order that discovery proceed on the issue of NIH's interest in the case. (See A-20, 23).

On appeal, then, there was nothing in the record to establish NIH's interest in the case apart from NIH's own untested assertions. Some of NIH's allegations, such as its reliance upon the expired court order for custody, have been proven false; all were highly suspicious, considering NIH's political interest in preserving the falsehood and its former disclaimers of any need or use for the monkeys.

Against this backdrop, the Fifth Circuit found as a matter of fact that "the planned euthanasia on the monkeys and accompanying research is in furtherance of NIH's statutory mission to donduct and fund biomedical research. (A-14, 15). By adverting to NIH's "statutory mission", the Fifth Circuit sidestepped the more pressing question of whether NIH has any real interest or authority in this case.[7] This was the central issue in dispute, the issue vigorously contested by plaintiffs, the issue on which the district court had made no finding, the issue on which further discovery had been ordered, and the issue on which the appellate court had no information other than NIH's self-serving and highly questionable statements. To engage in such fact-finding on such an issue, at the heart of the jurisdictional question, violated this Court's admonition that against *de novo* fact-finding. *Zenith Radio Corp. v. Hazeltime Research, Inc., supra.*

Even if 28 U.S.C. Sec. 1442(a) is read to authorize removal by a federal agency, this Court should grant certiorari to determine whether the Fifth Circuit properly determined that the NIH has sufficient interest in the case, as a matter of fact, to warrant the exercise of federal

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7. In an earlier proceeding NIH had resisted efforts to block its return of the Silver Spring Monkeys to IBR by stating that it lacked authority to retain IBR's property. (NIH Memorandum in Support of Motion to Dismiss, p. 18, *The Humane Society of the United States v. Black*, No. 81-2691 on the docket of the United States District Court for the District of Columbia.

jurisdiction.

II. THE FIFTH CIRCUIT ERRED IN FINDING THAT PLAINTIFFS LACKED STANDING.

A. *The Court Has Not Adequately addressed the Issues Presented.*

In their petition, plaintiffs asserted four separate state law claims, only one of which was addressed in the Fifth Circuit's decision. Plaintiffs' first claim, for abatement of a public nuisance; their second claim, for tortious negligence and intentional infliction of emotional distress; and their third claim for equitable relief, were overlooked by the circuit court which, relying upon the truncated listing of claims recited by defendants, reviewed only the fourth claim praying for the issuance of an injunction. In ruling that the asserted irreparable injuries were insufficient to support Article III standing, however, the circuit court did not confine its decision to the claim for injunctive relief. Instead, it ordered the entire case dismissed, including the three claims whose substance had completely escaped the court's notice. Thus, the Fifth Circuit issued a broad ruling based on an impermissibly narrow analysis, in violation of the essential rule that the existence of Article III injury "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U. S. 490, 500, 95 S.Ct. 2197, 2206(1975). Moreover, while any case in federal court must unquestionably meet Article III requirements, it was improper for the federal court to assert jurisdiction ove[illegible] nonfederal case in which local interests predominate, only to impose the more restrictive standing requirements of Article III and dismiss the action that state courts would have maintained.

Under Louisiana's liberal standing doctrine, plaintiffs would have easily cleared the standing hurdle in state court. *Cf., Ramsey River Road Property Owners v. Reeves*, 396 So.2d 873 (La. 1981); *Garden District Property Owners Association v. City of New Orleans*, 98 So.2d 922 (Orl. App. 1957), *writs denied* (La. 1958). The Louisiana Supreme Court, in a recently published decision, has determined that mental pain and anguish sustained by a person not directly injured, becauses of the negligent infliction of injury on a third person, is actionable. *Lejeune v. Rayne Branch Hospital*, 556 So.2d 559 (La. 1990). The intentional infliction of emotional distress asserted here works an even more direct injury on the plaintiffs. *Cf., Bazley v. Tortorich*, 397 So.2d 475 (La. 1981).

The Fifth Circuit analyzed the entire suit as though it were a citizen's or taxpayer's suit challenging some governmental action. Whatever the merits of that approach to the generalized assertions of the injunction and other equitable claim, see section B below, it is completely illogical to apply it to the first two counts of plaintiffs' petition which assert precise legal claims under state law. These tort and public nuisance claims are premised upon **private** disputes with defendants, rather than the sort of public interest claims that have traditionally awakened standing concerns. No other decision of which we are aware holds that the victim of a tort lacks standing to sue the tortfeasor for that wrong. However, in dismissing plaintiffs' **entire** action, including the tort claim, this is precisely what the Court ruled; and it did so without even acknowledging that the tort claim existed. To recognize and address plaintiffs' tort and public nuisance claims would be to broaden the inquiry undertaken by the court; and such broadening would necessarily vitiate the ultimate ruling of the court.

The Supreme Court explained in *Valley Forge* that the Article III requirement of injury in fact stems from a

"necessity to adjudge the legal rights of litigants in actual controversies." 454 U.S. 471, 102 S.Ct. 758. This Court emphasized its earlier pronouncement that:

> the power to declare the rights of individuals and to measure the authority of governments. . . "is legitimate only in the last resort, and as a necessity in the determination of a real, earnest and vital controversy."

Id.

This tension between the rights of individuals and the authority of governments may be central to a citizen's challenge to governmental conduct, but not to a private tort or nuisance action against private parties and the government. Defendants here recognized as much when they raised arguments of failure to state a claim under Louisiana law and Supremacy Clause protection against alleged interference with governmental action; defendants did not rely upon their standing argument alone to defeat plaintiffs' claims, and certainly not to defeat their claims against the private defendants, Tulane and IBR. Not having addressed those additional defense arguments, the Fifth Circuit offered no reasons for its dismissal of two of the claims against NIH, nor **any** of the claims against Tulane and IBR. Thus, the Court's finding with respect to standing was not "dispositive" in the sense of offering some explanation for the court's ordered dismissal of the entire action.

While plaintiffs disagree with the arguments advanced by defendants concerning plaintiffs' right of action and the Supremacy Clause, they agree that those arguments musts be reached and decided in defendants' favor in order to justify a dismissal of this action. Otherwise, there is no justification for dismissing plaintiffs' tort and public

nuisance claims against NIH and all of their claims against the other defendants.

B. *The Fifth Circuit erred in finding that plaintiffs lacked standing to maintain all their claims against NIH.*

Even in its treatment of this action as a citizens' suit against NIH, the Fifth Circuit improperly ruled that plaintiffs lacked standing. Central to the court's ruling was the finding, imported from the Fourth Circuit's decision in *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004, 107 S.Ct. 1624 (1987), that "even if the defendants were to comply with the laws putatively violated, the plaintiffs would still lack any right to continue their personal relationships with the monkeys." Decision at 2577. That finding was correct in *Primate Protection* but not here. In *Primate Protection* the plaintiffs were seeking enforcement of the provisions of the Animal Welfare Act within the laboratory, and were further seeking to prevent NIH's release of the animals to IBR, neither of which remedies would have re-acquainted the plaintiffs with the animals. Here, plaintiffs are seeking custody of the animals or transfer to a sanctuary where access would be restored. Therefore, even assuming that a right of future contact is essential to a showing of injury in fact, **plaintiffs have asserted such a right.** Moreover, nothing could do greater violence to that right than the planned euthanasia of the monkeys.

Plaintiffs have demonstrated that their prior contacts with the monkeys uniquely position them to suffer injury in fact from the killings. Some plaintiffs have personally cared for these animals in the past; others, humane officers, are personally charged by Louisiana law with insuring humane treatment for these animals. The Fifth

Circuit's statement that "plaintiffs neither allege facts which demonstrate that they have any aesthetic, conservational, or environmental interests in the laboratory monkeys. . .", (A-9, 10), disregards the very plain allegations to the contrary in the petition. The court's further statement "nor [do plaintiffs] allege facts which would demonstrate that the destruction of the laboratory monkeys would impair the plaintiffs' interests in monkeys living in the wild", *Id.*, is completely beside the point. This action never purported to safeguard an allegedly endangered species, but rather to secure protection for the discrete group of animals known as the Silver Spring Monkeys, whose senseless destruction is at the heart of this controversy. The court's suggestion that concern for an endangered species might make the claims of injury more cognizable erects an artificial barrier with no foundation in standing law. Surely in *Humane Society of Rochester v. Lyng*, 633 F.Supp. 480 (W.D.N.Y. 1980), cited by the court, there was no suggestion that the animals at issue — cows — were an endangered species. Yet the plaintiffs, having shown sufficient interest in the cows' mistreatment, were permitted to maintain their action. An interest in privately owned animals may be a rarer circumstance than environmental or conservational concerns, but there is nothing in the jurisprudence to indicate that such an interest, where it exists, provides a weaker foundation for standing than an interest in wild animals.

In holding plaintiffs' interest inadequate the Fifth Circuit has analogized to *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361 (1972), in which organizational commitment to protecting the environment was found insufficient to distinguish the plaintiff's interests from the inadequate concerns of the public in general. But in *Sierra Club*, the plaintiffs failed to plead that they had used the park they sought to protect. A year after deciding *Sierra Club*, this

court held in *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405 (1973), that an environmental organization had standing to challenge federal actions allegedly causing pollution of certain parks. The only distinction between the two cases is that the *SCRAP* plaintiffs specifically pleaded that they were users of the park. This allegation, the Court found, established a personal injury instead of the generalized grievance stated by the *Sierra Club* plaintiffs. Here, as in *SCRAP*, plaintiffs have alleged personal injuries that distinguish the action from *Sierra Club* and others expressing generalized grievances. The allegations that plaintiffs have personally cared for the Silver Spring Monkeys, expending time and money in that effort with defendants' consent, have negotiated with defendants for their release, have dedicated themselves to the preservation of the animals, have developed emotional ties with them, and are prepared to accept custody demonstrate close personal ties to the animals that greatly exceed the mere abstract concern the Fifth Circuit attributes to them.

Viewing the case from another angle, reflecting the objective of the standing requirement to insure a concrete "case or controversy", see *e.g., Valley Forge, supra*, this case hardly presents an abstract question of policy. Rather than airing "generalized grievances about the conduct of government", *See, Flast v. Cohen*, 392 U.S. 83, 106 (1968), plaintiffs have alleged concrete injuries involving a specific set of facts capable of precise resolution. Precise legal and factual questions have arisen concerning defendant's need, use, and interest in the monkeys, and these questions are susceptible of judicial determination without speculation. If plaintiffs make out their case of unjustified curelty [8] to

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8. The court erroneously stated that plaintiffs rely on La. R.S. 14:102.1 for their definition of cruelty to animals. Decision at n. 4, A-8. Plaintiffs

the animals, the injury they have suffered is susceptible of concrete redress.

Plaintiffs have alleged injury in fact that is likely to be redressed by a favorable decision. Article III standing requirements have been met, and if federal jurisdiction is present, the entire case should be permitted to proceed in the trial court.

Footnote 8 continued.

referred to the criminal statute only to support their assertion of a state policy against inhumane treatment of animals. Under the civil law, enforcement of anti-cruelty laws reposes with local humane officers, La. R.S. 3:2391. In this case, jurisdiction lies with the local humane officers, who would enforce a local ordinance that **does not exempt scientific research**. Code of Ordinances of St. Tammany Parish, Section 4-16.52. In any event plaintiffs contend that defendants have no legitimate research interest in the animals.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record, as listed below, and to the Solicitor General of the United States, in accordance with Rule 29.5(b) of the Rules of the Supreme Court, by depositing same in the U.S. mail, postage prepaid, this ____ day of ____, 1990.

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APPENDIX A

INTERNATIONAL PRIMATE PROTECTION LEAGUE, et al.,
Plaintiffs-Appellees,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, and National Institute of Health, Defendants-Appellants.

No. 89-3288

United States Court of Appeals,
Fifth Circuit.

March 8, 1990.

Animal rights groups brought suit in state court seeking to bar a University and the National Institutes of Health (NIH) from euthanizing certain monkeys which had been subjected to neurological damage and from conducting subsequent autopsy research. The NIH removed to federal court and the United States District Court for the Eastern District of Louisiana, Veronica D. Wicker, J., issued an injunction prohibiting disposal of the animals. Appeal was taken. The Court of Appeals, Gee, Circuit Judge, held that: (1) animal rights groups lacked standing under Article III to maintain action; (2) dismissal of suit was required rather than remand to state court; and (3) NIH had sufficient interest in monkeys to support removal of case to federal court.

Injunction vacated and case dismissed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEE, REAVLEY and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

In today's case we address the issue whether a preliminary injunction which prevents the National Institutes of Health from carrying out the euthanizing of three macaque monkeys in order to conduct medical research was properly granted. Having determined that the National Institutes of Health, a federal agency, has a sufficient interest in the euthanizing of the monkeys to allow it tc defend that interest in federal court, and concluding further that the plaintiffs have not alleged any injury sufficient to meet the standing requirements of Article III, we vacate the order of the district court granting the injunction and dismiss the case.

I. FACTS

In 1981, Dr. Edward Taub, the chief of the Behavioral Biology Center of the Institute of Behavioral Research, Inc. ("IBR"),[1] had been conducting experiments at IBR's Silver Spring, Maryland, facility concerning the ability of macaque monkeys to recover use of a limb after nerves in it had been severed. The project had been funded by the National Institutes of Health ("NIH") and was undertaken in a pursuit of benefits for the rehabilitation of human patients suffering from neurological damage.

[1] Prior to the present suit, IBR changed its name to the Institutes for Behavior Resources.

In September of 1981, Maryland police officers executed a warrant at the facility pursuant to their investigation into the alleged mistreatment of monkeys involved in the experiments. The search resulted in the seizure of 17 macaque monkeys and the arrest and conviction of Dr. Taub on multiple counts of animal cruelty under Article 27, § 59 of the Maryland's Code.[2] Pursuant to a court order, NIH was given temporary charge of the monkeys.

Following Dr. Taub's conviction, People for the Ethical Treatment of Animals, Inc. ("PETA"), along with the International Primate Protection League ("IPPL"), the Animal Law Enforcement Association and several named individuals brought suit in Montgomery County, Maryland seeking, inter alia, "custody" of the monkeys seized from the facility. The defendants removed to the United States District Court for the District of Maryland, which dismissed the case, finding that none of the claims of the plaintiffs alleged injury sufficient to give them standing to seek possession of the animals. The dismissal was affirmed by the Fourth Circuit. *See International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004, 107 S.Ct. 1624, 95 L.Ed.2d 198 (1987) [hereinafter *Primate Protection*].

Although the state court order granting temporary possession to NIH terminated in 1983, NIH has continued to act as keeper of the monkeys with the consent and

[2] Under this section, cruelty to animals is a criminal misdemeanor which carries a maximum imprisonment of ninety days and a maximum fine of $1,000 for each offense. Dr. Taub's convictions were later set aside because the Maryland statute was found not to apply to scientific research. *Taub v. State of Maryland*, 296 Md. 439, 463 A.2d 819 (1983). The statute has since been amended to apply to researches. Md.Code, Art. 27, § 59 (amended 1984).

cooperation of IBR, the monkeys' owners. In response to public clamor and to pressure from members of Congress. NIH transfered a number of the monkeys to Tulane's Delta Regional Primate Center. In December of 1988, NIH announced that they intended to euthanize three of these animals immediately. NIH hopes to gain, through the procedure and subsequent autopsy, knowledge that may lead to improvements in rehabilitation therapy for individuals who have suffered brain or spinal cord damage.

When NIH announced its decision, the present suit was filed in Louisiana Civil District Court asserting various state law claims and seeking possession of the monkeys. The plaintiffs in this suit are IPPL, PETA, Louisiana in Support of Animals and PETA's founder, Alex Pacheco. Named as defendants are NIH, IBR and Tulane. In December of 1989, the court issued a temporary restraining order prohibiting the euthanizing of any of the monkeys.

NIH removed the case, under the authority of 28 U.S.C. § 1442(a)(1), to the United States District Court for the Eastern District of Louisiana. The district court continued the state court's temporary restraining order, finding the equities of the case to favor the plaintiffs. As the district court extended the temporary restraining order beyond the 20 days permitted by Rule 65(b), the extended TRO became the functional equivalent of a preliminary injunction, appealable under 28 U.S.C. § 1292(a)(1). *See Fernandez-Rogue v. Smith*, 671 F.2d 426 (5th Cir. 1982).

II. DISCUSSION

NIH contends that the district court erred in extending the TRO as the plaintiff's have no likelihood of prevailing on the merits. In support of its contention, NIH

relies upon three theories. First, NIH asserts that the plaintiffs lack standing to seek possession of the mondeys. Second, NIH alleges that the Supremacy Clause bars the plaintiffs' from interfering with the planned euthanization and subsequent autopsy. Third, NIH alleges that Louisiana Law contains no provision permitting private persons to bring civil suits to redress alleged "animal rights" violations. Finding the issue of standing dispositive, we do not address the other two contentions in defendants' brief.

A. Standing

[1] To meet standing requirements under Article III, the plaintiff must demonstrate two things: First "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979); and second, a causal connection between the injury and the conduct such that the injury is "likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426, U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). The Supreme Court has recognized that injuries to a plaintiff's "aesthetic, conservational, and recreational interests are sufficient to meet the first requirement of Article III standing. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). The Court has likewise noted that some interests are "too abstract, or otherwise not appropriate, to be considered judicially cognizable." *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984). In the present case, the plaintiffs have advanced three separate claims of injury.

1. *Personal relationships*

The plaintiffs' first claim is that:

> Plaintiffs, plaintiff organizations and individual members thereof would suffer a permanent disruption of their personal relationships with the monkeys, relationships which were established prior to any previous litigation in related matters and which continued during such litigation.

This claim of injury to the plaintiffs' "personal relationships with the monkeys" is one which, within the context of this case, is insufficient to meet Article III requirements. At the outset, we recognize that the Fourth Circuit has previously rejected the virtually identical allegation by APPL and BETA in *Primate Protection.* 799 F.2d at 938. That Court reasoned that, even if the defendants were to comply with the laws putatively violated, the plaintiffs would still lack any right to continue their personal relationships with the monkeys.

The reasoning of the Fourth Circuit in *Primate Protection,* which we adopt today, is in accord with that of the Ninth Circuit in *Animal Lovers Volunteer Ass'n v. Weinberger,* 765 F.2d 937 (9th Cir. 1985), in which the plaintiffs in that case sought to enjoin the killing of goats in a federal enclave. The court held that the plaintiffs failed to allege sufficient injury to confer standing, finding that the Government's goat control measures "would produce no "direct sensory impact' on [the plaintiff's] own environment or on any environment to which [its] member[s] would have access." *Id.* at 939. The court noted that if the plaintiff could show that the killing of the goats "would affect its members' aesthetic or ecological surroundings" that the plaintiff's position might have been different. *Id.* at 938.

The cases cited by the plaintiffs, in which courts have found animal rights groups to have met the Article III injury requirement, provide scant support to their

claim of injury. Unlike the privately-owned laboratory animals involved in the present situation, the animals in the majority of those cases were feral ones which, were the challenged conduct of the defendants to be enjoined, the members of the plaintiff organizations could freely enjoy. For example in *Japan Whaling Assoc. v. American Cetacean Soc'y,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), the Supreme Court held that the plaintiffs in that case had "alleged a sufficient "injury in fact' in that the whale watching the studying of their members [would] be adversely affected by continued whale harvesting." Similarly, in *Animal Welfare Institute v. Kreps,* 561 F.2d 1002 (D.C.Cir.1977), *cert. denied,* 474 U.S. 1013, 98 S.Ct. 726, 54 L.Ed.2d 756 (1978), the court held that the plaintiffs had standing because the defendants' action "impair[ed] the ability of the members of the Plaintiff organizations to see, photograph, and enjoy Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to excessive harvesting, inhumane treatment and slaughter." Also, in *Alaska Fish & Wildlife Federation v. Dunkle,* 829 F.2d 933, 937 (9th Cir.1987), *cert. denied,* 485 U.S. 988, 108 S.Ct. 1290, 99 L.Ed.2d 501 (1988), the court held sufficient the plaintiffs' allegation that the defendants' actions would injure "those who wish to hunt, photograph, observe, or carry out scientific studies on the migratory birds." In *American Horse Protection Association v. Frizzell,* 403 F.Supp. 1206, 1214 (D.Nev.1975), the court likewise found sufficient the allegation that "[a]mong the plaintiff's individual members are persons residing in the State of Nevada and the District of Columbia and other states who have in the past and *have the right in the future* to be users and enjoyers of the lands and wildlife which is the subject of this suit."

The plaintiffs do cite one case in which an animal rights group was held to have standing to protest the treat-

ment of privately-owned animals. In *Humane Soc'y v. Lyng*, 633 F.Supp. 480 (W.D.N.Y.1980), a local humane society challenged a federal regulation requiring dairy farmers admitted to the Dairy Termination Program to hot brand their cows.[3] The court held the humane society to have standing because New York State law specifically authorized it to prosecute violations of animal cruelty laws. *Id.* at 485.

The plaintiffs maintain that among their numbers are humane officers authorized under Louisiana law to remove animals being treated cruelly. *See* La.Rev.Stat.Ann. § 3:2431, and fails to allege that any of statutory prerequisites to animal removal have been met.[4] *See Id.* at §§ 3:2432-38.

2. *Long standing, sincere commitment*

The plainfiffs' second claim of injury is that:

> Plaintiffs, plaintiff organizations and individual members thereof maintain a long-standing, sincere commitment to preventing inhumane treatment of animals, especially as concerns the monkeys now at Delta, and their

3. *See* U.S. Department of Agriculture Notice LD-248; *see also* H.R.Rep. No. 99-271(I), 99th cong, 2st Sess. 20-21, *reprinted in* 1985 U.S.Code Cong. and Admin.News 1103, 1124-25; 7 U.S.C. § 1446(d)(3).

4. We note that even if these hurdles were overcome, a finding that the euthanasia of the monkeys would constitute cruelty under § 3:2431 is unlikely. In their attempt to characterize the defendants' planned action as cruelty, the plaintiffs rely on § 14:102.1, defining criminal cruelty to animals. Although this section does hold guilty one who "[t]ortures, torments, cruelly beats or unjustifiably injures, maims, mutilates, or kills any living animal," the section contains an express exemption for scientific and medical research.

> aesthetic, conservational and environmental interests would be particularly, severely, and detrimentally affected.

The plaintiffs' "long-standing, sincere commitment" is likewise insufficient to support standing under Article III. In *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), the Supreme Court rejected the Sierra Club's contention that its organizational commitment to conservation was sufficient to meet the injury requirement, stating:

> The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

Id. at 739, 92 S.Ct. at 1368. Similarly, the plaintiffs' sincere commitment to the humane treatment of animals in the present case is insufficient to distinguish them from other members of the public.

The plaintiffs' claim of harm to their "aesthetic, conservational and environmental interests" fails for the same reason that their "personal relationship" claim fails. The plaintiffs neither allege facts which demonstrate that they have any aesthetic, conservational or environmental in-

terests in the laboratory monkeys, nor allege facts which would demonstrate that the destruction of the laboratory monkeys would impair the plaintiffs' interests in monkeys living in the wild. Were the plaintiffs to allege, for example, that the species of monkey here involved was endangered and that the destruction of the laboratory monkeys would therefore impair conservation efforts to preserve or restore such an endangered species to its wild habitat, their claims of injury might be more cognizable. As they have not (and likely could not credibly) make such an allegation, the plaintiffs second claim of injury is insufficient to confer standing.

3. *Advocates for the monkeys*

The plaintiffs' third claim of injury is that:

> Plaintiffs' mission as advocates for the rights of the Silver Spring Monkeys, who have no means of protecting themselves, would be severely impaired.

As discussed above, the Supreme Court in *Sierra Club* has ruled this kind of "special interest" insufficient to confer standing. Implicit in the plaintiffs' third claimed injury, however, is the contention that the plaintiffs should be allowed standing because to deny it would leave the monkeys unprotected. The Supreme Court rejected a similar contention in *Valley Forge Christian College v. Americans United for Separation of Church and State:*

> " 'The assumption that if respondents have no standing to sue, no one would have standing.' This view would convert standing into a requirement that must be observed only when satisfied. Moreover, we are unwiling to assume that injured parties are nonexistent simply because

> they have not joined respondents in their suit. The law of averages is not a substitute for standing."

454 U.S. 464, 489, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982) (citation omitted). Accordingly, the mere fact that the monkeys would be left without an advocate in court does not create standing where it otherwise does not exist.

B. Removal

[2] The plaintiffs contend that even if they lack standing under Article III, they meet the requirements for standing under state law; as they allege only state law causes of action, the plaintiffs maintain, the more stringent Article III requirements need not be met. Although standing requirements in state courts are often less stringent than those of Article III, the issue lacks relevance here, as standing in federal court is determined entirely by Article III and depends in no degree on whether standing exists under state law. *Phillips Petroleum Co. v. Shotts*, 472 U.S. 797, 804, 105 S.Ct. 2965, 2970, 86 L.Ed.2d 628 (1985). This rule applies as well to cases which arrive in federal court by means of removal. *See Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 687 (8th Cir.1979).

[3] The plaintiffs urge that, if they cannot properly maintain suit in federal court, the case should be remanded to Louisiana state court. The present case was removed by NIH under the authority of 28 U.S.C. § 1442(a)(1), which permits removal by "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." Unlike removal under § 1441, where the discovery of a jurisdictional defect would require remand to state court, a federal defendant's right of removal under § 1442(a)(1) is absolute. *Arizona v.*

Manypenny, 451 U.S. 232, 242, 101 S.Ct. 1657, 1664, 68 L.Ed.2d 58 (1981). If a case has been removed pursuant to § 1442(a)(1), a plaintiff's lack of Article III standing requires dismissal of his claims against the federal defendant, regardless of the plaintiff's previous standing in state court. *Maine Ass'n of Interdependent Neighborhoods, Inc. v. Petit*, 644 F.Supp. 81, 84-85; *see also Maine Ass'n of Interdependent Neighborhoods, Inc. v. Commissioner, Maine Dept. of Human Services*, 876 F.2d 1051, 1055 (1st Cir.1989).

The plaintiffs contend, however, that removal of the action by NIH under § 1442(a)(1) was improper. The plaintiffs urge two theories in support of their contention: First, that as NIH is a federal agency, and not a federal officer, § 1442(a)(1) is inapplicable; second, that NIH has no legally cognizable interest in the monkeys sufficient to support removal under § 1442(a)(1).

1. *Federal agencies*

[4] Although the plaintiffs concede that we have previously stated that § 1442(a)(1) applies to federal agencies, they contend that such statements were merely dicta. In *Smith v. City of Picayune*, 795 F.2d 482 (5th Cir.1986), we held that a federal district court did not abuse its discretion by entertaining a plaintiff's state law claims because the Farmers Home Administration, a federal agency, was a defendant in the case and could have removed the case to federal court under §1442(a)(1) had it been filed in state court. *Id.* at 485. In so holding, we noted a split of authority on the issue of whether 1442(a)(1) applies to federal agencies[5] and accepted the view that it did. As we

5. *See* 14A Wright, Miller & Cooper, Federal Practice & Procedure § 3727 (2d ed. 1985).

expressly found state issues predominant in that litigation, our determination that the agency could have removed under § 1442 was crucial to our holding that the district court had jurisdiction to hear the case. *Id.*[6] The plaintiffs' attempt to characterize our holding in that case as nonauthoritative is weak at best.

2. *NIH's interest in the monkeys*

[5] The plaintiffs maintain that although they named NIH as a defendant in this action, NIH has had no interest in the monkeys following the expiration of the court order giving it temporary "custody"; if NIH has no interest, the plaintiffs contend, then removal under § 1442 was improper.

The plaintiffs fail to recognize that "the only prerequisite to removal of a civil action under § 1442 is that it be *brought against* a federal officer or agency." *IMFC Professional Servs. v. Latin Am. Home Health, Inc.*, 676 f.2d 152 (5th Cir. Unit B 1982). As NIH is named as a defendant in the present action, the case was properly removed.

Although we find the case to have been properly removed, we recognize that if NIH indeed has no interest whatsoever in the monkeys, the dismissal of NIH from the suit would require remand, rather than dismissal, of the plaintiffs' suit against Tulane and IBR. *Cf. IMFC*, 676 F.2d at 158-59; *Williams v. City of Atlanta*, 794 F.2d 624, (11th Cir.1986). The issue here then is whether NIH's possessory, financial and research interests in the monkeys are sufficient to allow it the right to protect those interests

6. *See also IMFC Professional Servs. v. Latin Am. Home Health Inc.*, 676 F.2d 152, 155-56 (5th Cir. Unit B 1982).

in federal court.

In enacting 28 U.S.C. § 1442, Congress recognized that

> federal officers are entitled to, and the interest of national supremacy requires, the protection of a federal forum in those actions commemced in state court that could arrest, restrict, impair, or interfere with the exercise of federal authority by federal officials.

Murray v. Murray, 621 F.2d 103, 106 (5th Cir.1980). In *Murray*, the United States was named as a Garnishee in a state court lawsuit by a woman against her ex-husband seeking her husband's Veterans' Administration benefits in satisfaction of unpaid alimony. The government removed under § 1442(a)(1) to federal district court, which denied Mrs. Murray relief on summary judgment. We reversed the judgment of the district court for want of jurisdiction, reasoning that the United States was a "mere stakeholder" in the action. We held that because the government was unable to identify how the disposition of the garnishment action in state court could "arrest, restrict, impair, or interfere with the actions of a federal official or the operations of the federal government," the action fell beyond the scope of protection afforded by § 1442(a)(1). *Id.* at 107.

In the present case, NIH has demonstrated that its interest goes beyond that of "mere stakeholder." HIH funded IBR's original experimentation on the monkeys and, with the owner's consent, serves as the monkeys' keeper. More important, however, is that the planned euthanasia on the monkeys and accompanying research is furtherance of NIH's statutory mission to conduct and

and fund biomedical research. Because the injunctive relief sought by the plaintiffs could interfere with NIH's operations, it is entitled to protect its legitimate interests in a federal forum. As federal court jurisdiction is limited by the constitution, the plaintiffs' failure to allege injury sufficient to satisfy Article III standing requirements is fatal to their suit. Accordingly, we VACATE the order of the district court granting the preliminary injunction and DISMISS the case.

APPENDIX B

International Primate Protection League, et al.

v.

Administrators of the Tulane Educational Fund, et al.

United States District Court
Eastern District of Louisiana

TEMPORARY RESTRAINING ORDER

Considering the verified petition for temporary restraining order and preliminary and permanent injunction, and for good cause shown,

IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the "Silver Spring Monkeys.."

This order to remain in effect through midnight, February 1, 1989, unless otherwise terminated.

THUS DONE AND SIGNED this 6th day of January, 1989, New Orleans, Louisiana.

/s/ Veronica D. Wicker
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

International Primate Protection League, et al.

v.

Administrators of the Tulane Educational Fund, et al.

WEDNESDAY, FEBRUARY 1, 1989
10:00 A.M.

MOTION OF PLAINTIFFS TO REMAND.

DENIED

MOTION OF NAT'L INSTITUTE OF HEALTH TO DISMISS.

DENIED. without prejudice to be reset by the movers.

DATE OF ENTRY FEB 2 1989.

APPENDIX D

International Primate Protection League, et al.

v.

Administrators of the Tulane Educational Fund et al.

United States District Court
Eastern Distsrict of Louisiana

WEDNESDAY, April 12, 1989

10:00 A.M.

MOTION OF THE UNITED STATES OF AMERICA TO DISMISS.

ARGUED

DENIED AT THIS TIME.

APPENDIX E

International Primate Protection League, et al.

v.

Administrators of the Tulane Educational Fund, et al.

United States District Court
Eastern District of Louisiana

WEDNESDAY, MAY 3, 1989

10:00 A.M.

MOTION OF THE UNITED STATES FOR STAY, PENDING APPEAL.

MOTION ARGUED. MOTION DENIED INSOFAR AS TO THE JURISDICTION ISSUE; GRANTED AS TO ALL OTHER ISSUES.

MOTION OF THE UNITED STATES FOR INDICATIVE RULING.

ARGUED DENIED. . T.R.O. NOT DISSOLVED AT THIS TIME.

DATE OF ENTRY MAY 4 1989

APPENDIX F

MINUTE ENTRY
WYNNE, M.
August 16, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL. CIVIL ACTION

VERSUS NUMBER:88-5713

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL. SECTION "L" (2)

FILED AUG 17 89

HEARING ON MOTION

APPEARANCES:

MOTION: of the plaintiffs

(1) Motion to Compel

(2)

(3)

— :

1 : Opposition

ORDERED

1 : DENIED The motion is denied because this

Court is divested of jurisdiction over matters involved in the appeal pending before the Fifth Circuit Court of Appeals. Plaintiffs are seeking discovery on the issues which are presently pending before the Fifth Circuit. Newball v. Offshore Logistics International, 803 F.2nd 821 (C.A. 5 1986), United States v. Hitchmon, 602 F. 2nd 689, (C.A. 5 Cir. 1979, en banc)

MICHAELLE PITARD WYNNE
United States Magistrate

CLERK TO NOTIFY ALL COUNSEL

DATE OF ENTRY AUG 17 1989

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 89-3288

FILED AUG 9 1989

INTERNATIONAL PRIMATE PROTECTION ET AL.,
Plaintiffs-Appellees

versus

ADMINISTRATORS OF TULANE EDUCATIONAL FUND and NATIONAL INSTITUTES OF HEALTH,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

---

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee(s) to dismiss the appeal is DENIED. There is no showing of consent to extend the temporary restraining order beyond February 1, 1989 - certainly not beyond April 12, 1989. See *Fernandez-Rogue v. Smith* 671 F.2d 426, 429 (5th Cir. 1982).

APPENDIX H

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL.

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND ET AL.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

WEDNESDAY, SEPTEMBER 13, 1989
10:00 A.M.

MOTION OF PLAINTIFFS INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ETC. TO REVIEW MAGISTRATE'S ORDER DENYING MOTION TO COMPEL.

ARGUED. COURT UPHOLDS THE MAGISTRATE.
MOTION TO CERTIFY.
DENIED

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3288

FILED APR 13 1990

INTERNATIONAL PRIMATE PROTECTION, ET AL.,
Plaintiff-Appellees,

versus

ADMINISTRATORS OF TULANE ED. FUND
and NATIONAL INSTITUTES OF HEALTH,
Defendants-Appellants.

Appeals from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(APRIL 13, 1990)

Before GEE, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ illegible

United States Circuit Judge

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3288

FILED MAY 2 1990

INTERNATIONAL PRIMATE PROTECTION, ET AL.,
Plaintiffs-Appellees,

versus

ADMINISTRATORS OF TULANE EDUCATIONAL FUND and NATIONAL INSTITUTES OF HEALTH,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

---

O R D E R :

☒ The motion of *appellees* for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/s/ Thomas Gibbs Gee
UNITED STATES CIRCUIT JUDGE
THOMAS GIBBS GEE

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	NO. 88-5713
v.	*	SECTION: "L" (2)
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	
	* *	

NOTICE OF APPEAL

The United States of America, on behalf of its agency the National Institutes of Health, hereby appeals to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §1292(a), from the order entered on April 12, 1989.

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Ruth Morris Force

RUTH MORRIS FORCE
Assistant U.S. Attorney
Hale Boggs Federal Building
500 Camp Street, Room 205
New Orleans, LA 70130
Telephone: (504) 589-3561
LA Bar Roll No.: 5683

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 17 day of April, 1989.

/s/ R M Force

Assistant U. S. Attorney

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	CIVIL ACTION
versus	NO. 88-5713
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	SECTION L (2)

NOTICE OF APPEAL

The United States of America, on behalf of its agency the National Institutes of Health, hereby appeals to the United States Court of Appeals for the Fifth Circuit the decision of the District Court on May 3, 1989, on the Motion of the United States for an Indicative Ruling.

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Ruth Morris Force

RUTH MORRIS FORCE -5683
Assistant U.S. Attorney
Hale Boggs Federal Building
500 Camp Street
New Orleans, Louisiana 70130
Telephone: (504) 589-3561

APPENDIX M

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. **DIVISION " "** **DOCKET NO.**

FILED Dec 28

INTERNATIONAL PRIMATE
PROTECTION LEAGUE, ET AL

versus

ADMINISTRATORS OF THE TULANE
EDUCATIONAL FUND, ET AL

FILED: _____ _____
DY. CLERK

PETITION FOR DECLARATORY
AND/OR INJUNCTIVE RELIEF

The petition of International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members, respectfully represents:

I.

Made defendants herein are the Administrators of the Tulane Educational fund, the National Institutes of Health (NIH) and the Institutes for Behavior Resources, Inc. (IBR).

II.

Plaintiffs, International Primate Protection League (IPPL), People for the Ethical Treatment of Animals (PETA), and Louisiana in Support of Animals ( ), are private organizations for the humane treatment of animals, with their main offices in South Carolina, Maryland, and Louisiana respectively. Plaintiff Alex Pacheco is founder and chairman of PETA and is domiciled in Maryland.

III.

Defendant the Administrators of the Tulane Educational Fund (Tulane) is a corporate body established by the statutory law of Louisiana and based in New Orleans, Louisiana. It governs the Tulane Medical Center, one branch of which is the Delta Regional Primate Research Center.

IV.

Defendant National Institutes of Health is a federal agency in the Department of Health and Human Services, whose main office is in Maryland, and which is doing business in Louisiana.

V.

Defendant Institutes for Behavior Resources, Inc. is a private research corporation in the District of Columbia, which claims (contested) ownership of certain monkeys that are being housed in Louisiana.

VI.

Plaintiffs seek to enjoin defendants and any of their

agents, officers, representatives, employees and/or all those persons in concert with them from destroying or otherwise disposing of or injuring any of the surviving primates known as the "Silver Spring Monkeys", and further seeks judgment declaring that plaintiffs or members of the U.S. Congress be made custodian of those monkeys.

VII.

In May, 1981, plaintiff Alex Pacheco was hired by Edward Taub, PhD, head of the IBR's warehouse laboratory, to assist in primate experiments. In particular, IBR was conducting experiments on a number of macaque monkeys, highly intelligent and social animals. The experiments, conducted pursuant to a grant funded by the NIH, involved severing spinal nerves and observing the animals' capacity to learn to use their limbs. The survivors of such experimentation have come to be known as "the Silver Spring Monkeys."

VIII.

In the course of his employment, Mr. Pacheco discovered the Silver Spring Monkeys were receiving inadequate care, and that the experiments were needlessly repetitive and cruel. The monkeys showed signs of extreme distress. During the course of and as a result of faulty experimentation and neglect, many of the monkeys had not only suffered crippled limbs, but also had torn or bitten off their own fingers and performed other acts of self-multilation; they had inflicted wounds on monkeys in adjoining cages; bones protruded through their flesh; muscle tissue was exposed; the cages housing the animals were tiny, rusted, broken and filthy; no one had properly bandaged the animals and no veterinarian was ever used; and the animals' feeding was neglected, resulting in their going

without food for days or eating food contaminated by fecal matter.

IX.

As a consequence of his treatment of the animals, Dr. Taub was charged with seventeen criminal violations. Pending those proceedings, the police and plaintiffs herein PETA and Pacheco took temporary custody of the Silver Spring Monkeys; the Circuit Court for Montgomery County later ordered them transferred to NIH facilities in Poolesville, Maryland. At that facility, the monkeys were kept in isolation and provided no rehabilitation. Years later, the monkeys were transferred by NIH, custodians of the monkeys, to the Delta Regional Primate Research Center, a component of Tulane University in New Orleans, Louisiana.

X.

Defendants herein IBR and NIH represented orally and in writing to plaintiffs, to the public, and to the United States Congress that: 1) corrective surgery (amputation) to crippled limbs of the animals would be carried out; 2) the animals would be resocialized; 3) no invasive research would take place; and 4) the animals would not be killed but allowed to live out their natural lives.

XI.

In spite of their assurances and in complete violation of their commitments to the plaintiffs, to the public and to the U. S. Congress, defendants have made an express determination to exterminate the monkeys.

XII.

On information and belief, the extermination of at least three Silver Spring Monkeys is imminent.

XIII.

Plaintiffs have offered since 1981 to house, maintain and resocialize the Silver Spring Monkeys at Primarily Primates, a refuge specifically established for the care of abused primates, in San Antonio, Texas. Over two hundred members of Congress have signed a resolution stating that this refuge is the most appropriate facility for resocialization of the monkeys, and still more have written letters requesting that the animals be transferred to that facility. As an alternative, Moorpark College in California has offered to care for the monkeys, which offer is also supported by many members of Congress and by plaintiffs.

XIV.

Defendants have refused to transfer the monkeys to either facility and they have: 1) not performed the needed corrective (amputation) surgery, and 2) not resocialized the animals.

XV.

Veterinarians who have viewed these monkeys have expressed their opinions that euthanasia is not warranted by the facts of this case, and that the monkeys could live out their natural lives safely, humanely and comfortably if transferred to a suitable facility.

XVI.

A number of respected scientists have also opined

that the past abusive, inhumane and unscientific treatment of the Silver Spring Monkeys would invalidate any further research or experimentation on the animals. IBR and NIH have previously expressed their disinterest in conducting any further research or experimentation on these animals, and neither Tulane nor Delta has expressed any desire or intention to use them in connection with any research or experimentation.

COUNT I

XVIII.

Louisiana has a strong public policy against inhumane treatment of animals. That policy is expressed in La. R.S. 14:102.1, which includes as an "offense affecting the public sensibility" the unjustified killing of animals. Title 3 of the Louisiana Revised Statutes at Sections 2431 et seq., and 2391 et seq. also further the state's policy interest in humane treatment of animals, including proper care and avoidance of unjustified euthanasia.

XVIII.

Defendants' 1) refusal to transfer the monkeys, 2) their decision to exterminate some of the animals, 3) their decision to deprive the animals of needed surgery and 4) their decision to continue to confine and isolate the animals and deprive them of resocialization, are in violation of Louisiana's public policy against inhumane treatment of animals and constitute a public nuisance.

COUNT II

XIX

Defendants above-listed conduct has caused extreme

emotional distress to plaintiff organizations and their members, whose mission is to avoid and prevent such inhumane treatment of animals. Members of plaintiff organizations, including plaintiff Alex Pacheco, have had personal contact with the Silver Spring Monkeys and have developed longstanding relationships marked by deep affection for the animals. Their present treatment and defendants' proposed killing of three of the animals has caused plaintiffs mental anguish and does violence to the missions of the plaintiff organizations.

XX.

Defendants' negligent treatment of the Silver Springs Monkeys and their intentional infliction of emotional distress and mental anguish on plaintiffs are violative of La. C.C. Art. 2315.

COUNT III.

XXI.

Plaintiffs seek an order transferring custody of the Silver Spring Monkeys from defendants, who have no further need, use, or concern for them, to either plaintiffs or members of Congress who have expressed willingness to assume such custody.

XXII.

On information and belief, the Silver Spring Monkeys are financial burdens to IBR rather than a financial asset, because the monkeys are not the subjects of any present experimentation, yet the annual expense of housing them is approximately $30,000.00 apiece.

XXIII.

Legal remedies are inadequate to safeguard the plaintiffs' rights.

XXIV.

Article 4 of the Louisiana Civil Code provides that "[w]hen no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity." In this case, the highly intelligent and socialized nature of the Silver Spring Monkeys, Louisiana's public policy of humane treatment to animals, plaintiffs' profound concern for the monkeys, and defendants' disregard for and cruelty towards them dictate that the only just and equitable solution is transfer of their custody to plaintiffs or members of Congress.

COUNT IV.

XXV.

If defendants are not enjoined and restrained from continuing to cruelly confine and deprive the animals of needed surgery and from killing the monkeys plaintiffs will suffer irreparable harm and loss in that:

a. Plaintiffs, plaintiff organizations and individual members thereof would suffer a permanent disruption of their personal relationships with the monkeys, relationships which were established prior to any previous litigation in related matters and which continued during such litigation.

b. Plaintiffs, plaintiff organizations and individual members thereof maintain a long-standing, sincere commit-

ment to preventing inhumane treatment of animals, especially as concerns the monkeys now at Delta, and their aesthetic, conservational and environmental interests would be particularly, severely and detrimentally affected.

c. Plaintiffs' mission as advocates for the right of the Silver Spring Monkeys, who have no means of protecting themselves, would be severely impaired.

XXVII.

If defendants are restrained from cruelly confining and killing the monkeys, their only burden will be to uphold state statutes requiring humane treatment of animals.

XXVIII.

There are no adequate pecuniary standards for the measurement of damages which have been and would be sustained by the plaintiffs, who have suffered as a result of the treatment of these animals and will suffer even more if the defendants are not prohibited from needlessly killing the monkeys.

WHEREFORE, plaintiffs pray that this Court:

A. Immediately grant a temporary restraining order enjoining the defendants from in any way cruelly confining and destroying the Silver Spring Monkeys during the pendency of this proceeding;

B. Grant a preliminary injunction to the same effect as paragraph A;

C. Grant a permanent injunction enjoining the above-described conduct;

D. Order that custody of the monkeys be given to the plaintiffs or to members of the U. S. Congress; and

E. Grant whatever additional relief may be dictated by law and equity together with costs and attorneys fees.

Respectfully Submitted,

/s/ Margaret E. Woodward
BAR No. 13677
610 POYDRAS ST., SUITE 318
NEW ORLEANS, LA 70130
PHONE: 504-525-9538
ATTORNEY FOR PETA

PLEASE SERVE:

1. ADMINISTRATORS OF TULANE EDUCATIONAL FUND
   Through Ron Mason or Clarence Sheps
   6823 St. Charles Avenue
   New Orleans, LA 70118

2. INSTITUTE FOR BEHAVIORAL RESOURCES

   (Please Hold Service)

3. NATIONAL INSTITUTES OF HEALTH

   (Please Hold Service)

VERIFICATION

I, Alex Pacheco have read the foregoing Petition for Declaratory and/or Injunctive Relief and duly swear that all allegations contained therein are true to the best of my knowledge and belief.

Washington, D.C., this 28th day of December, 1988.

/s/ Alex Pacheco

Supreme Court, U.S.
FILED
SEP 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)
No. 90-89

In the Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, ET AL., PETITIONERS

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL INSTITUTES OF HEALTH IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA L. HERWIG
LOWELL V. STURGILL, JR.
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioners' suit to enjoin research activities related to privately owned laboratory animals was properly dismissed for lack of standing.

2. Whether federal agencies may remove cases pursuant to 28 U.S.C. 1442(a)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-89

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, ET AL., PETITIONERS

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL INSTITUTES OF HEALTH IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 895 F.2d 1056.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A15) was entered on March 8, 1990. A petition for rehearing was denied on April 13, 1990. Pet. App. A24-A25. The petition for a writ of certiorari was filed on July 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the care and custody of macaque monkeys that were the subject of experiments to discern whether the monkeys recovered use of limbs after nerves to the limbs were severed. Pet. App. A2. The experiments were conducted during 1981 by a private research facility—then called the "Institute for Behavioral Research, Inc.," later the "Institutes for Behavior Resources" (IBR)—under funding from the National Institutes of Health (NIH). *Ibid.* The purpose of the experiments was to gain information that could be used in rehabilitating human patients with neurological damage. *Ibid.*

In September 1981, Maryland police executed a warrant at IBR and seized the monkeys, acting upon allegations that the monkeys were being mistreated. Pet. App. A3. Pursuant to a court order, NIH assumed custody of the monkeys. *Ibid.* After that order expired, NIH continued to act as the monkeys' principal custodian with the consent and cooperation of the monkeys' owner, IBR. Pet. App. A3-A4.

In December 1988, NIH announced plans to perform euthanasia on three of the monkeys pursuant to the recommendation of a panel of independent experts. Pet. App. A4. These three monkeys were then being kept at Tulane University's Delta Regional Primate Research Center. *Ibid.* The euthanasia procedure, which would involve deep surgical anaesthesia, was designed to be humane and painless and to gain knowledge that could lead to improvements in rehabilitation therapy for persons who have suffered brain or spinal cord damage, a stroke, or similar injuries. *Ibid.*

Before NIH could carry out the euthanasia, petitioners sued NIH, IBR, and the Administrators of Tulane Educational Fund (Tulane) in Louisiana state court. Pet. App. A4. Petitioners sought an order enjoining the euthanasia and granting custody of the monkeys to petitioners or members of the U.S. Congress. Pet. App. A38-A39. After the state court granted petitioners' motion for a temporary injunction barring respondents from performing euthanasia on the three monkeys, NIH removed the case to the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. 1442 (a)(1). NIH then moved to dismiss the case on, among other grounds, petitioners' failure to establish Article III standing to sue.

Pending consideration of NIH's motion, the district court entered an order that in effect continued the temporary restraining order granted by the state court. Pet. App. A16. The district court later refused to vacate its order when NIH objected that the order had exceeded the twenty-day limit imposed by Federal Rule of Civil Procedure 65(b). Pet. App. A4.

NIH and Tulane appealed the order, which they argued had become the functional equivalent of a preliminary injunction appealable under 28 U.S.C. 1292(a)(1), to the United States Court of Appeals for the Fifth Circuit. Pet. App. A4. On appeal, NIH and Tulane argued that the injunction was improper because petitioners failed in their pleadings to establish Article III standing and so had not proven likelihood of success on the merits.[1]

[1] NIH and Tulane also argued that petitioners' suit was barred by the Supremacy Clause and failed to state a cause of action under Louisiana state law. The court of appeals did not reach those arguments. Pet. App. A5.

The court of appeals agreed that none of the three bases for standing alleged by petitioners satisfied Article III requirements; it accordingly vacated the injunction and dismissed the case. With regard to the first basis asserted—a "permanent disruption of [petitioners'] personal relationships with the monkeys"—the court observed that the Fourth Circuit had already rejected the "virtually identical" claim when in previous litigation the claim was asserted against IBR by two of the petitioners herein. See *International Primate Protection League* v. *Institute for Behavioral Research, Inc. (IPPL)*, 799 F.2d 934 (4th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). The court below adopted the reasoning of the Fourth Circuit, which held that petitioners had not established a sufficient causal connection between the alleged injury and the conduct complained of: "[E]ven if the defendants were to comply with the laws putatively violated, the plaintiffs would still lack any right to continue their personal relationships with the monkeys." Pet. App. A6. The court below further held that petitioners' second and third allegations of Article III injury—asserting harm to their "long-standing, sincere commitment to preventing inhumane treatment of animals" and to their "mission as advocates for the rights" of the monkeys—did not state cognizable injuries. For this holding, the court below relied principally on *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), and *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464 (1982). Pet. App. A8-A11.[2]

[2] The court of appeals also rejected as irrelevant petitioners' contention that they had met the requirements for standing under state law, noting that the existence of Article III standing is governed by federal law. Pet. App. A11.

The court of appeals also held that the case was properly removed under 28 U.S.C. 1442(a)(1). Pet. App. A11-A15. Relying on prior decisions of the Fifth Circuit, the court rejected petitioners' argument that Section 1442(a)(1) does not authorize removal by federal agencies. Pet. App. A12-A13. The court also rejected petitioners' argument that, although they had named NIH as a defendant, NIH's interest in the monkeys was insufficient to permit removal under Section 1442(a)(1). Pet. App. A13-A15. The court concluded that "the only prerequisite to removal of a civil action under § 1442 is that it be *brought against* a federal officer or agency." Pet. App. A13 (quoting *IMFC Professional Services* v. *Latin American Home Health, Inc.*, 676 F.2d 152 (5th Cir. 1982)). The court further concluded that "NIH's possessory, financial and research interests" in the monkeys were sufficient to warrant the protection of a federal forum afforded by the removal statute. Pet. App. A13-A15.

After the court of appeals issued its ruling and denied petitioners' motion for a stay of mandate pending certiorari (Pet. App. A26), respondents performed the euthanasia procedure previously planned for three of the monkeys. Earlier, upon the court's granting petitioners' motion for partial immediate resolution of the appeal, NIH had also performed euthanasia on a fourth monkey that was in severe pain and danger of imminent death. The case is not moot, however, because four monkeys of the original group of seventeen are still alive and are being housed at the Delta Regional Primate Research Center in Louisiana. Pet. 4.

ARGUMENT

The decision of the court of appeals is correct and presents no issue meriting review by this Court.

1. The court of appeals' ruling that petitioners' pleadings did not establish Article III standing is correct and does not conflict with any decision of this Court or any court of appeals.[3]

Petitioners' complaint alleged three forms of injury: (1) "permanent disruption of their personal relationships with the monkeys," Pet. App. A37; (2) impairment of their "sincere commitment to preventing inhumane treatment of animals, especially as concerns the monkeys now at Delta," Pet. App. A37-A38; and (3) impairment of their "mission as advocates for the right of the Silver Spring Monkeys, who have no means of protecting themselves," Pet. App. A38. None of these allegations demonstrates Article III standing.[4]

a. Petitioners' first allegation of injury was addressed by the Fourth Circuit in a case that this

[3] The court of appeals correctly applied federal law to determine whether petitioners had standing. See Pet. App. A11 (citing cases). See also *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988) (applying federal law to determine whether plaintiffs had Article III standing to sue in federal court); *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 953-54 n.2 (1984) (same); *Waller* v. *Georgia*, 467 U.S. 39, 43-44 & n.3 (1984) (same); *Tileston* v. *Ullman*, 318 U.S. 44 (1943) (same).

[4] Petitioners improperly charge that in assessing their standing the court of appeals ignored several of their claims. Pet. 18. This charge is misguided, for it confuses allegations regarding legal theories of recovery with allegations regarding the injury for which recovery is sought. The latter were properly the focus of the court of appeals' analysis. See *Los Angeles* v. *Lyons*, 461 U.S. 95, 103 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 499 (1974).

Court declined to review. *International Primate Protection League, Inc.* v. *Institute for Behavioral Research, Inc. (IPPL)*, 799 F.2d 934 (1986), cert. denied, 481 U.S. 1004 (1987). In *IPPL*, two of the petitioners in this case alleged that the same conduct complained of here caused "disruption of their personal relationship" with the same group of monkeys involved in this case. 799 F.2d at 938. The Fourth Circuit held that these allegations did not demonstrate standing because the asserted injury was not fairly traceable to the challenged conduct: "[T]hese plaintiffs could not see the monkeys in the IBR laboratory if the defendants satisfied all requirements of care." *Ibid.* Petitioners now concede (Pet. 21) that this holding was correct.

The holding denying standing in *IPPL* is fully applicable in this case, as the court below recognized. Here, as in *IPPL*, any relationship between petitioners and the monkeys has come about largely in the course of litigation. *Ibid.* To this extent, any disruption flows from the vicissitudes of litigation and is not cognizable injury in fact. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982). Any other ties that may exist are jeopardized, not by the conduct complained of, but by the fact that these monkeys are privately owned research animals. It is the fact of private ownership, about which petitioners do not and could not complain, that causes the alleged injury.[5] In short, petitioners' assertion (Pet. 21) of a "right

[5] This fact distinguishes this case from those involving feral animals. *E.g.*, *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221 (1986). The court of appeals was correct to conclude (Pet. App. A6-A7) that such cases "provide scant support" for petitioners' claim of injury.

of future contact" with the monkeys suffers from the same "traceability" defect identified in *IPPL*.[6]

Petitioners cannot cure this defect by asserting that they sought broader relief in this case than they did in *IPPL*. See Pet. 21.[7] The scope of relief requested may affect the "redressability" component of the standing inquiry; it is irrelevant, however, to the "fairly traceable" component. *Allen* v. *Wright*, 468 U.S. 737, 746-747 (1984). "Cases such as this, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is important to keep the [" 'fairly traceable' and redressability"] inquiries separate." *Id.* at 753 n.19. Petitioners thus offer no reason why the Fourth Circuit's admittedly correct ruling in *IPPL* should not apply here.

This is not to say that petitioners fare any better in satisfying Article III's requirement that they show their alleged injury "is likely to be redressed

[6] The court of appeals in this case was correct to focus, as did the Fourth Circuit in *IPPL*, on petitioners' alleged interest in future contact with the monkeys rather than on allegations of past injury. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *Animal Protection Inst. of America* v. *Hodel*, 860 F.2d 920, 923-924 (9th Cir. 1988); *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc.* v. *Dunkle*, 829 F.2d 933 (9th Cir. 1987), cert. denied, 485 U.S. 988 (1988); *Animal Welfare Inst.* v. *Kreps*, 561 F.2d 1002 (D.C. Cir. 1977). This focus is mandated by the Article III requirement that federal courts only exercise jurisdiction when judicial relief would redress the injuries alleged. See, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978).

[7] Contrary to petitioners' assertion (Pet. 21), their request in this case for custody of the monkeys does not distinguish the relief sought here from that sought in *IPPL*. Plaintiffs in *IPPL* also sought custody of the monkeys. 799 F.2d at 937.

by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976). On the contrary, as the court below held (Pet. App. A8)—a holding that petitioners do not challenge—petitioners' complaint failed to allege that they had met the statutory prerequisites to removal of the primates from NIH's custody under Louisiana law.[8] This failure, as the court below correctly observed, distinguishes this case from those in which plaintiffs have included officials authorized by state law to prosecute violations of animal cruelty laws. Compare *Humane Society* v. *Lyng*, 633 F. Supp. 480 (W.D.N.Y. 1986). Moreover, none of petitioners' other state law causes of action entitled them to continue their relationships with the monkeys or to be granted custody of them. See Pet. App. A35-A37.

b. The court of appeals was correct when it held that plaintiffs' second and third allegations of injury were insufficient to create Article III standing. In *Sierra Club*, this Court addressed an allegation substantially similar to petitioners' second allegation, which asserts a long-standing commitment to preventing inhumane treatment of animals. See 405 U.S. at 735-740. The Court concluded that assertion

[8] Petitioners' Appendix omits several lines from this portion of the court of appeals' opinion, which, as reported, reads as follows:

> The plaintiffs maintain that among their numbers are humane officers authorized under Louisiana law to remove animals being treated cruelly. *See* La.Rev.Stat.Ann. § 3:2431 (West 1987). The plaintiffs' complaint, however, makes no mention of this fact, does not assert a cause of action under § 3:2431, and fails to allege that any of statutory prerequisites to animal removal have been met. *See id.* at §§ 3:2432-38.

895 F.2d at 1060.

of such an interest does not satisfy the "require-[ment] that the party seeking review be himself among the injured." *Id.* at 735. Just as an interest in conservation was not enough in *Sierra Club* to establish standing in the absence of a link to the particular lands at issue, so too here an interest in humane treatment of animals is not enough to establish standing in the absence of a link to the particular animals at issue here. See *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3187-3189 (1990).

In *Valley Forge*, the Court addressed an allegation substantially similar to plaintiffs' third allegation, which asserts their role as advocates for the primates. The Court in *Valley Forge* expressly rejected the notion that standing should be granted simply because judicial review otherwise would be unavailable. 454 U.S. at 489. The court of appeals' application of *Sierra Club* and *Valley Forge* to conclude that petitioners' second and third allegations of injury were insufficient was clearly correct.

c. In any event, the court of appeals would have been justified to dismiss this case on Supremacy Clause grounds. U.S. Const. Art. VI, Cl. 2. The Supremacy Clause plainly bars petitioners' attempt to use the state law causes of action alleged in their complaint to regulate the federal government's custody of the monkeys. See, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, —— n.1 (1988); *Hancock* v. *Train*, 426 U.S. 167, 178 (1975). The Supremacy Clause required dismissal of the private defendants as well as NIH in this action, because the state law causes of action petitioners asserted would have effectively prohibited NIH from carrying out its plans to perform euthanasia on the monkeys. So applied, state law would directly conflict with

the federal policy against interference with federally funded research that employs laboratory animals. See 7 U.S.C. 2143(a)(6)(A)(i) and (ii); see also, *e.g.*, *Public Utilities Comm'n* v. *United States*, 355 U.S. 534, 544 (1958); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956) (per curiam). Thus, the Supremacy Clause argument, which was raised below but not reached, provided an independent ground upon which this case was properly dismissed.

2. This Court should not grant certiorari to decide whether NIH was entitled to remove this case to federal court under 28 U.S.C. 1442(a)(1). The decision below does conflict with the Third Circuit's decision in *Lovell Mfg., Div. of Patterson-Erie Corp.* v. *Export-Import Bank of United States*, 843 F.2d 725, 733 (1988), but that court is the only other court of appeals to have directly addressed the question whether Section 1442(a)(1) is available to federal agencies, as well as federal officers.[9] The issue would benefit from "further study" in the lower courts "before it is addressed by this Court," *McCray* v.

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[9] Contrary to petitioners' view (Pet. 11-13), the Fourth Circuit did not "implicitly" hold in *IPPL* that agencies may not remove cases to federal court under 1442(a)(1). Plaintiffs in *IPPL* brought suit in state court alleging both state and federal law causes of action. *IPPL*, 799 F.2d at 936-937. The case was therefore removable under Section 1441, and NIH removed it without opposition. *Id.* at 937. The Fourth Circuit dismissed the case, including the state law claims, upon ruling that plaintiffs had not stated a federal claim. *Id.* at 938-940. The Court based dismissal not upon an intepretation of Section 1442(a)(1), but rather on the fundamental principle of pendent jurisdiction that "state claims should usually be dismissed if the federal claims have been dismissed before trial." 799 F.2d at 941 (citing *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966)).

New York, 461 U.S. 961, 963 (1983) (Stevens, J.), and accordingly certiorari should not be granted at this time.

As evidenced by the fact that only two circuits have decided the question, the issue of the applicability of Section 1442(a)(1) to federal agencies does not arise with sufficient frequency to warrant this Court's immediate attention. The reason is clear: Federal agencies normally cannot be sued in their own name in state court. This case is a good example. Petitioners' state court suit against NIH was plainly barred by sovereign immunity. See, *e.g.*, *Dugan* v. *Rank*, 372 U.S. 609, 620-622 (1963). There is a waiver of sovereign immunity in the Administrative Procedure Act that might apply to the activities of NIH, see 5 U.S.C. 702, but the waiver is expressly limited to actions brought in federal court.[10] In addition, NIH—like many federal agencies—may not be sued in its own name. *Blackmar* v. *Guerre*, 342 U.S. 512 (1952) (agency may not be sued *eo nomine* in the absence of statute authorizing such suit).[11] Thus, the question petitioners seek

[10] See *Aminoil, U.S.A., Inc.* v. *California State Water Resources Control Bd.*, 674 F.2d 1227, 1233 (9th Cir. 1982) ("[T]he waiver of sovereign immunity in section 702 is expressly limited to actions brought 'in a court of the United States . . . .' The legislative history demonstrates that section 702 was not intended to effect a waiver of sovereign immunity for suits against the United States or its officers in state courts. 'The consent to suit is also limited to claims in the courts of the United States; hence, the United States remains immune from suit in state courts.' H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 11 (1976) * * *.").

[11] Though improperly sued in its own name, NIH clearly had an interest in this case sufficient to entitle NIH to remove it. As the court of appeals determined, NIH has "possessory, financial, and research interests" in the monkeys that were

to present concerning Section 1442 has arisen only because this suit was improperly filed in state court in the first place, in violation of sovereign immunity, against the wrong defendant. Such a case is a peculiarly inappropriate vehicle in which to attempt to address the question petitioners seek to raise.

Finally, the court below correctly concluded that Section 1442(a)(1) authorizes federal agencies to remove cases to federal court. Section 1442(a)(1) has roots reaching back to 1815, when Congress was concerned that States might interfere with enforcement of a federally promulgated boycott of English goods.[12] See *Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969). Thus, the statute is "an incident of federal supremacy," and it protects "the very basic interest in the enforcement of federal law through federal officials." *Id.* at 406.

Section 1442(a)(1) affords this protection by providing a federal forum to rule on defenses raised in response to claims attacking federal actions. 395 U.S. at 407. As this Court stated in *Willingham*, 395 U.S. at 407, "Congress has decided that federal officers, and *indeed the Federal Government itself*,

threatened by this suit. Pet. App. A13. The court did not, in making this determination, engage in impermissible fact-finding. See App. A and B, *infra*. The court had an ample factual basis to support its conclusion and did not contradict any of the trial court's findings of fact. Moreover, NIH's interest in this case is clear from the provisions that establish NIH's statutory mandate. See 42 U.S.C. 281-284c. In any event, petitioners' fact-specific challenge to the court of appeals' determination does not justify this Court's review.

[12] While earlier versions of the removal statute protected only revenue officers, Section 1442(a)(1) was expanded during the 1948 recodification of Title 28 "to apply to all officers and employees of the United States or any agency thereof." H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947).

require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of [Section] 1442(a)(1)." (emphasis added). See also *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144-147 (1971) (extending to federal agency rule permitting suit by the United States to enjoin enforcement of state court injunction).

Section 1442(a)(1) would afford scant protection to the federal government if it were read to preclude removal by federal agencies. Such a narrow interpretation would enable plaintiffs to deprive the government of a federal forum merely by naming only the agency, and not its officials, as a defendant. This expediency clearly would contravene the policy enunciated in *Willingham*, for any relief granted against the agency would bind its officials. Cf. Fed. R. Civ. P. 65(d). See also 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3727, at 457 (2d ed. 1985) (allowing agencies to remove under Section 1442(a)(1) "is justified in terms of the intent of Congress to protect the valid exercise of federal authority; a less inclusive construction would serve to frustrate that end").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1990

APPENDIX A

AFFIDAVIT

STATE OF LOUISIANA

CITY OF NEW ORLEANS

I, Peter Gerone, Sc.D., having been duly sworn, state that the following is true and correct:

1. I am the Director of the Delta Regional Primate Research Center of Tulane University.

2. In accepting the Silver Spring monkeys in June of 1986, on behalf of Tulane University, it was my understanding that we would aid the National Institutes of Health (NIH) in its role as the custodian of the monkeys which are legally owned by the Institute for Behavioral Resources, Inc. (IBR) of Washington, D.C.

3. In aiding the (NIH) in its role as custodians of these monkeys, we accepted the responsibility to suitably house them, provide for their clinical care, and consider resocializing the animals, if that was feasible.

4. Although my staff and I have been involved in making evaluations and recommendations regarding health and well-being of the Silver Spring monkeys, the final decisions regarding clinical care have been made and will continue to be made by the owners, IBR, and the primary custodians, NIH.

Peter J. Garone
PETER J. GARONE, Sc.D

SUBSCRIBED AND SWORN BEFORE ME THIS 26 DAY OF JANUARY, 1989.

[Illegible]
NOTARY PUBLIC

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 88-5713

INTERNATIONAL PRIMATE PROTECTION LEAGUE, et al.,

v.

ADMINISTRATORS OF THE TULANE EDUCATION FUND, et al.

DECLARATION OF JOSEPH V. BRADY

Joseph V. Brady declares:

1. I am the President and Chairman of the Board of the Institutes for Behavioral Resources, Inc. (IBR). I have been President since August 1988 and Chairman for the past five (5) years. I have been a member of the Board of IBR since the founding of its predecessor, I have thorough knowledge of the events surrounding the nonhuman primates that were seized by the Montgomery County Police from the IBR laboratories in September, 1981.

2. Since October 14, 1981 the monkeys have been in the care and custody of the National Institutes of Health (NIH). From that date to August 10, 1983, the NIH custody of the animals has been maintained with the consent and cooperation of the IBR, although we have never signed a document formalizing the custody arrangement.

3. Throughout the period of NIH custody, NIH has housed and fed the animals and provided routine veterinary care with minimal consultation with the

IBR. NIH has consulted with the IBR on major medical procedures regarding the animals and on its plans for them. In some cases, IBR has not fully agreed with the NIH decisions regarding the animals. However, after stating our views, we acquiesced in those decisions.

4. We did not pay NIH for the costs it incurred while the animals were cared for at the National Institutes of Health and we have no intention of doing so. Since the animals were transferred to the Delta Regional Primate Center in Covington, Louisiana, we have been reimbursing NIH at the rate of $1.82 per day for each animal. We recognize that this does not cover all the costs incurred by the NIH.

5. We were consulted by the NIH regarding the proposed euthanasia of three of the animals and we fully concur with the NIH decision. We strongly support the research that would be conducted in conjunction with the euthanasia. We believe this research will benefit rehabilitation therapy, that it will fulfill the function for which the animals were obtained by the IBR and will ensure that their long period of maintenance in a deafferented condition has not been in vain.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATE: February 10, 1989

/s/ Joseph V. Brady
JOSEPH V. BRADY

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Supreme Court, U.S.
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No. 90-89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, *et al.*,
Petitioners,

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT INSTITUTES FOR BEHAVIOR RESOURCES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a state court action seeking injunctive relief against agents and employees of a federal agency [in this case the National Institutes of Health ("NIH")] is subject to removal under 28 U.S.C. § 1442(a)(1) when the relief sought against such agents and employees is clearly set forth in the "Petition for Declaratory and/or Injunctive Relief," although the agents and employees are not individually listed in the caption of the Petition?

2. Whether private plaintiffs* who have secured a Temporary Restraining Order in state court, which order on its face affects property in which a federal agency (in this case NIH) has an interest, and who after removal to federal court secured an injunction against the agency and its agents, are entitled to a remand to state court by contending that there may be no federal interest to be protected?

3. In light of the clearly articulated federal policy [reflected in the Animal Welfare Act, 7 U.S.C. § 2131, *et seq.* (1982)] establishing an elaborate federal regulatory scheme for the protection of laboratory animals and precluding disruption of scientific research by private special interest groups, did the Fifth Circuit properly deny standing to the Primate League, which sought custody of privately owned research animals being used for NIH-sponsored scientific experiments?

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* All of the petitioners, appellants and plaintiffs below, International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco and Louisiana In Support of Animals, and its members, are for clarity and simplicity sometimes hereinafter referred to as "Primate League."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-89

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, *et al.*,
Petitioners,

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT INSTITUTES FOR BEHAVIOR RESOURCES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Institutes for Behavior Resources, Inc., respectfully requests that the petition for writ of certiorari be denied.

OPINION BELOW

The opinion of the Court of Appeals is reported at 895 F.2d 1056. Petitioners' Appendix, A1-15, omits from the opinion of the Court of Appeals half a paragraph of text accompanying footnote 4.

STATUTES INVOLVED

28 U.S.C. § 1442(a)(1) and the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* (1982).

COUNTERSTATEMENT OF THE CASE

Respondent, Institutes for Behavior Resources, Inc. ("IBR"), objects to petitioners' statement of the case.[1] A more accurate statement of the facts can be derived from the Fourth Circuit opinion in *International Primate Protection League, et al.* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), where virtually identical prayers for relief to those in this action were asserted by two of the petitioners; from the IBR Brief in Opposition to the Petition for a Writ of Certiorari to the Fourth Circuit; and from the opinion below.

Dr. Edward Taub, the chief of the Behavioral Biology Center of the Institutes for Behavior Resources, Inc., was studying the capacity of monkeys to learn to use a limb after nerves had been severed. Funded by the National Institutes of Health ("NIH"), the project amplified Dr. Taub's earlier research in this area and attempted to discover benefits for the rehabilitation of human patients suffering from a serious neurological injury such as stroke. 799 F.2d at 936.

Alex Pacheco, then an undergraduate student, who, unknown to Dr. Taub, had founded People for the Ethical Treatment of Animals ("PETA"), offered to work as a volunteer for Taub at the IBR animal laboratory facility in Silver Spring, Maryland. Dr. Taub gave Pacheco the keys to the premises and permission to enter at any time, and Pacheco came regularly to the laboratory during the summer of 1981. Pacheco asked the Montgomery County Police Department to investigate IBR for animal cruelty under Section 59 of the Maryland Code.

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[1] For example, contrary to petitioners' statement that Dr. Taub's experiments were "terminated for unjustifiable cruelty," Pet. 3, the Department of Health and Human Services' Departmental Grant Appeals Board exonerated Dr. Taub as to all charges of animal cruelty. HHS-GAB, Decision No. 538, May 31, 1984.

The police obtained a search warrant from the Circuit Court for Montgomery County and on September 11, 1981 seized from IBR the 17 monkeys in the experiment. Subsequently, criminal charges were filed against Dr. Taub alleging 17 counts involving 119 violations of the Maryland animal cruelty statute. 799 F.2d at 936.

On October 9, 1981, the Circuit Court for Montgomery County, without opposition from IBR, directed the transfer of the monkeys to an NIH facility in Poolesville, Maryland. The order was to remain in effect "until further Order of this Court or the termination of the pending criminal prosecution against Dr. Taub, whichever occurs first." 799 F.2d at 936.

Dr. Taub stood trial in November 1981 in the District Court for Montgomery County, which entered orders of conviction for failure to provide "necessary veterinary care" for six monkeys and acquitted Dr. Taub of all the other 113 charges. Fearing that the court order on custody of the monkeys would partially expire with the acquittals, PETA acted quickly to prevent the return of any animals to IBR. Along with the International Primate Protection League and others, PETA filed a bill of complaint on December 3, 1981 in the Circuit Court for Montgomery County in which they purported to speak for "their own and class interests and as next friends of seventeen (17) non-human primates." PETA alleged that a civil inquiry would show IBR violations of the Maryland animal cruelty laws and the federal Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* PETA asked the court to designate the plaintiffs as guardians of the monkeys, and to enjoin all parties from permitting IBR to regain possession. 799 F.2d at 936.

NIH removed the case to the U.S. District Court for the District of Maryland pursuant to 28 U.S.C. § 1441.

Meanwhile, the Maryland criminal prosecution also moved toward resolution. Dr. Taub appealed his six District Court convictions to the Circuit Court for Mont-

gomery County, where a jury, after a "trial de novo," returned a guilty verdict against Taub on one count (failure to provide necessary veterinary care to one monkey). The Court of Appeals of Maryland then granted a writ of certiorari and in August 1983 reversed the conviction, holding that Article 27, Section 59 of the Maryland Code did not apply to an institution conducting medical research pursuant to a federal program. *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983).

After the termination of criminal proceedings, the Maryland suit became the only remaining litigation over the custody of the monkeys. In 1985 the Maryland federal district court dismissed the case for lack of standing.

In June 1986, the plaintiff appealed to the Fourth Circuit. After submission of the case, the monkeys were transferred by NIH from Poolesville, Maryland, to Tulane's Delta Primate Center in Covington, Louisiana. Primate League apparently regarded the Delta Primate Center as an unsuitable custodian and objected to the 90-day quarantine that was imposed upon the primates as newly arrived animals at the facility. In the Court of Appeals, Primate League sought, *inter alia*, a show cause order for return of the primates to Poolesville, Maryland, or a transfer of custody of the primates to their designee. The Fourth Circuit, having been advised that IBR, the owner of the primates, did not object to their transfer by NIH to the Delta Primate Center, denied the motion on September 3, 1986. IBR Brief in Opposition to Certiorari in No. 86-1115, at 2.

The Fourth Circuit affirmed the District Court, stating in part—

> "In this case we must decide whether a group of private individuals may challenge a medical researcher's compliance with federal standards for the care of laboratory animals. Because we find that the plaintiffs lack standing to bring such a lawsuit, we affirm the judgment of the district court in its dismissal of this action.

> "To imply a cause of action in these plaintiffs might entail serious consequences. It might open the use of animals in biomedical research to the hazards and vicissitudes of courtroom litigation. It may draw judges into the supervision and regulation of laboratory research. It might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering. To risk consequences of this magnitude in the absence of clear direction from the Congress would be ill-advised. In fact, we are persuaded that Congress intended that the independence of medical research be respected and that administrative enforcement govern the Animal Welfare Act." 799 F.2d at 935.

Primate League then petitioned this Court for a writ of certiorari which was denied in 1987. 481 U.S. 1004 (1987).

In 1988, NIH determined, based on the recommendation of a panel of independent experts in veterinary care, primate behavior, and neurology, that three of the monkeys should be euthanized because of the amount of distress they were experiencing. Plans were made to humanely euthanize them on December 28-31, 1988. Memorandum in Opposition to Motion to Compel (by NIH) August 11, 1989, at 3. NIH hoped to gain, through the procedure and subsequent autopsy, knowledge that might lead to improvements in rehabilitation therapy for individuals who have suffered brain or spinal cord damage. *International Primate Protection League* v. *Tulane Educational Fund*, 895 F.2d. 1056, 1058 (5th Cir. 1990).

On December 28, 1988, Primate League, PETA, and others filed suit in the Civil District Court for the Parish of Orleans in the State of Louisiana seeking, *inter alia*, injunctive relief against the "agents and officers of NIH, IBR, and the administrator of the Tulane Education Fund," and seeking custody of the monkeys. 895 F.2d at 1058, Pet. App. A-30-32.

In December of 1989, the state court issued a temporary restraining order which provided as follows:

> "It is ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys', placed in their keeping by the National Institute of Health and/or the Institute for Behavioral Research." Appendix A.

NIH removed the case, under the authority of 28 U.S.C. § 1442(a)(1), to the United States District Court for the Eastern District of Louisiana. After removal, petitioners moved for and secured a temporary restraining order ("TRO") from the federal court which provided,

> "IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys'." Appendix B.

As the district court extended the temporary restraining order beyond the 20 days permitted by Fed. R. Civ. P. 65(b), the extended TRO became the functional equivalent of a preliminary injunction, appealable under 28 U.S.C. § 1292(a)(1). 895 F.2d at 1058.

The court below concluded that petitioners did not meet the standing requirement of Article III, and dismissed the entire case. In reaching this result the court relied heavily on the Fourth Circuit decision in the *IPPL* case. The Fifth Circuit found no merit in petitioners' contention that they could establish standing under state law because, as the court properly held, standing in federal courts, including removed actions, is governed exclusively by Article III of the Constitution. 895 F.2d at 1058-61.

REASONS FOR DENYING THE WRIT

I. THIS IS NOT A CASE TO RESOLVE THE QUESTION OF WHETHER OR NOT A FEDERAL AGENCY CAN REMOVE TO FEDERAL COURT UNDER 28 U.S.C. § 1442(a)(1), WHEN RELIEF IS SOUGHT ONLY AGAINST THE AGENCY; IN THIS CASE, THE PETITION SEEKS INJUNCTIVE RELIEF NOT ONLY AGAINST THE AGENCY (NIH) BUT ALSO AN INJUNCTION AGAINST THE "AGENTS, OFFICERS, REPRESENTATIVES" OF NIH.

Petitioners are correct that the district courts are divided on the question of whether a federal agency, in an action seeking relief only against a federal agency, can remove the case to federal court under 28 U.S.C. § 1442(a)(1); the statute on its face authorizes removal by "any officer of the United States or any agency thereof," but not by the agency itself.

The Courts of Appeals are also divided on this question. The Fifth Circuit in the opinion below, and in other cases, and the Eighth Circuit in *Johnson* v. *Showers*, 747 F.2d 1228 (8th Cir. 1984), have held that the objective of the statute can be better achieved by permitting agencies, as well as their officers, to remove cases to federal court. This would seem to be the sounder view where the agency's officers and agents could be bound by an injunction against it. Fed. R. Civ. P. 65(d). Only the Third Circuit has taken the opposite view. *See Lovell Mfg., Div. of Patterson-Erie Corp.* v. *Export-Import Bank of the United States*, 843 F.2d 725 (3d Cir. 1988).

The *Lovell* case involved a suit against the Export-Import Bank of the United States ("Eximbank") and the Foreign Credit Insurance Association ("FCIA"), an association of private insurance companies formed to support Eximbank's statutory mandate of promoting United States exports. 843 F.2d at 727. Originally one claim by the exporter, Lovell, was against FICA on a commercial

risk policy. A second claim was against Eximbank on a political risk policy. *Id.*

Shortly after the case was removed from state to federal court, Lovell dropped the political risk claim. Accordingly, the litigation was "predominantly, if not exclusively, a state law claim against an association of private insurance companies." 843 F.2d at 728, 732. Eximbank's only involvement was based on a separate reinsurance agreement with FCIA to which Lovell was not a party. *Id.* Thus Eximbank was only a "nominal defendant" and as the court observed ". . . no reason appears why Eximbank has not been formally dismissed from this case." 843 F.2d at 731 n.8.

The action could not have resulted in a judgment against Eximbank. Eximbank's "tangential interest" [2] was in not having a reinsurance contract claim made by FCIA against the United States, presumably in the United States Claims Court under 28 U.S.C. § 1491 (1982). In no event could there be a judgment for Lovell granting relief against an officer of Eximbank either in the pending case or in follow-up litigation.

Since, as the Third Circuit concluded, "the purpose of a section 1442 removal is to protect federal officials from unfriendly state forums . . . for conduct performed under color of federal office," it reasoned that it was doubtful that allowing removal where relief could be secured only against private insurance companies would serve any such purpose. 843 F.2d at 734 n.13. Accordingly, a remand to state court was directed. 843 F.2d at 735.

However, in this case, petitioners sought injunctive relief not only against NIH but also against its officers. Pet. App. A-30-32. We are not aware of any case that holds that removal under Section 1442(a)(1) is precluded where, as here, injunctive relief is specifically sought

[2] 843 F.2d at 733.

against the "agents, officers, representatives" of a federal agency. Consequently, there is no contra-authority, nor is there a split between circuits applicable to the controlling facts of this case.

The officers of NIH are not named as defendants in the caption. However, it would be excessively formalistic to condition removal on the style of the case, rather than on the relief sought against federal officers. For example, in *Johnson* v. *Showers*, *supra*, the Eighth Circuit allowed a Section 1442(a)(1) removal by an agency ". . . based on the government's unopposed view that the action should be deemed as one brought against FEMA's Director . . ." even though the Director was not listed in the caption. 747 F.2d at 1229.

In *Willingham* v. *Morgan*, 395 U.S. 402, 406-07 (1969), this Court held that 28 U.S.C. § 1442 was to be broadly construed "to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law."

Usually, to avoid the defense of sovereign immunity, suits to enjoin governmental conduct are nominally brought against officers or agents of a government agency alleging that the officer or agent was acting in excess of his authority, or that his conduct was not legally justified. *See, e.g., Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Blackmar* v. *Guerre*, 342 U.S. 515 (1952).

Such suits are disfavored where, as here, property in which the government has an interest is involved, or governmental functions may be affected. As this Court stated in *Larson*, *supra*, at 703:

> "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, 'The interference of the Courts with the performance

> of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . .' "

In light of these important public policy considerations, applicable to actions such as this one, the availability of removal to federal courts should be based on the reality of the relief sought. It should not turn on such irrelevant factors as the incompetence or deviousness of counsel who draft the petition.

The Fifth Circuit was clearly correct in permitting the removal under 28 U.S.C. § 1442(a)(1). This is not a case to review the separate question of whether removal under Section 1442(a)(1) is proper in a state court action against an agency in which relief is not sought against its officers or agents.

II. THE FOURTH CIRCUIT IN THE *IPPL* CASE NEITHER HELD NOR IMPLIED THAT A SUIT IN STATE COURT UNDER STATE LAW, SEEKING RELIEF AGAINST THE OFFICERS AND AGENTS OF NIH, IBR, AND TULANE, COULD NOT BE REMOVED TO FEDERAL COURT PURSUANT TO SECTION 1442(a)(1) WHERE FEDERAL COURT STANDING WOULD BE REQUIRED.

Petitioners misconstrued the implications of *International Primate Protection League* v. *Institutes for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986). They argue that the refusal of the court to take jurisdiction over their state law claims against NIH implied a determination that removal of a similar action under Section 1442(a)(1), when filed in Louisiana would not be proper, and that *res judicata* precluded relitigation of the jurisdictional issue in the Louisiana action. Pet. 11-13.

The Fourth Circuit case did not involve Section 1442 in any respect. The removal, exclusively under Section 1441(a), was based on the existence of a federal question. Since, before trial, standing was found to be lacking as

to the federal claims, the state law claims were dismissed rather than remanded pursuant to the rule of *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966).

The situation is entirely different when a case is removed under Section 1442(a). To protect the interest of federal officers, and the federal government, the entire case is removed and state law issues are decided in federal court even in the absence of a federal question and notwithstanding that the action would not be within the original jurisdiction of the federal court. *Mir* v. *Frostburg*, 646 F.2d 342, 344 (9th Cir. 1980).

Consequently, there was no *res judicata* effect favorable to petitioners. The Fourth Circuit opinion could only have been *res judicata* as to the absence of U.S. Const. Art. III federal court standing.

Once the removal was effected, Article III principles of standing become applicable to the state claims, as the court below held. 895 F.2d at 1061. Since Primate League was again seeking custody of the monkeys, *res judicata* precluded relitigation of the Fourth Circuit's determination that petitioners lacked federal court standing with respect to the removed claims. *Cf. Robinson* v. *National Cash Register Co.*, 808 F.2d 1119, 1124-25 (5th Cir. 1987).

III. THE FEDERAL INTEREST JUSTIFYING REMOVAL IS CLEARLY ESTABLISHED BY THE RELIEF SOUGHT BY PETITIONERS, AND THE TEMPORARY RESTRAINING ORDER THEY SECURED AGAINST NIH AND ITS AGENTS.

The federal interest justifying removal is readily apparent. In the District Court NIH submitted a declaration of Dr. William F. Raub, then Deputy Director of NIH, which contains the following statement:

> "As custodian of the animals, NIH will continue to exercise its best judgment to carry out its plan, developed in consultation with experts in veterinary

care, rehabilitation medicine and primate behavior, that: (1) the unoperated animals be introduced into group-living arrangements appropriate to maintaining their long-term well-being; and (2) the experimentally disabled animals be cared for individually until euthanasia is required because of significant pain or distress or they die of natural causes. To date, IBR has acquiesced to NIH retaining custody and control of the animals and to the actions NIH has taken to carry out its plan." Appendix C, para. 8.

The NIH role was well known. On June 3, 1988, the United States General Accounting Office issued a report to Congress concerning the cost incurred by the federal government in caring for the monkeys. That report states in part:

> "Table 1 shows the composition of the government's $105,084 cost, as of February 29, 1988, for the care of the Silver Spring Monkeys." *Research Animals*, Federal Costs for Care of the Silver Spring Monkeys, GAO/HRD-88-89 (B-230545), at 4.

Of that amount, NIH estimated that it had spent $11,600 for litigation involving the monkeys, not counting costs incurred by the United States Attorney's Office. *Id.* at 6-7.

Consequently, it was not surprising that petitioners, when they filed their state court action, named NIH as a defendant and sought relief not only against NIH, but also its "agents, officers, representatives, employees." Pet. App. A31-32.

The Civil District Court for the Parish of Orleans on December 29, 1988 issued a TRO which provided as follows:

> "IT IS ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of

> those macaque monkeys known as the 'Silver Spring Monkeys', placed in their keeping by the National Institutes of Health and/or the Institute for Behavioral Research." Appendix A.

After the case was removed to federal court, petitioner sought a TRO against "NIH and their agents, attorneys, and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys know as the 'Silver Spring Monkeys.'" Appendix B.

The District Court then issued a TRO which provided:

> "IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys, and servants, from inhumane treatment, or euthanasia or other destruction of monkeys known as the 'Silver Spring Monkeys'." Appendix B, at 2.

Having sought and secured injunctive relief against NIH and its "agents, officers. representatives," petitioners are in no position to contend that there is no federal interest to be protected in federal court. The record establishes that not withstanding NIH's interest in its research protocol announced in December 1988, the euthanasia and experimentation were not conducted until after the TRO was vacated.

The federal interest is "direct and substantial" when an agency of the United States may be bound by a judgment or order in the action. *Lovell*, 843 F.2d at 733 n.12.

IV. THE COURT BELOW PROPERLY CONCLUDED THAT PETITIONERS LACKED STANDING TO ASSERT THEIR STATE LAW CLAIMS.

Petitioners concede that the Fourth Circuit in *IPPL* was correct in denying them federal court standing under the Animal Welfare Act. Pet. 21. They attempt to distinguish *IPPL* on the ground that only in this Fifth Cir-

cuit action do they seek access restoring custody of the monkeys. *Id.* This argument is incorrect. In the Maryland action, petitioners sought to be made guardians of the monkeys, and the Fourth Circuit specifically stated in its opinion that "[p]laintiffs also argue that Maryland law supports their claim for custody of the monkeys." 799 F.2d at 940-41. Consequently, the relief sought does not serve to distinguish the case below from the Fourth Circuit case.

Secondly, petitioners contend that their state law claims seeking "abatement of a public nuisance," and for "tortious negligence and intentional infliction of emotional distress," should not have been dismissed because they "would have easily cleared the standing hurdle in state court." Pet. 18-19. However, the Court below correctly held the Article III standing must be established under federal, not state law, principles. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804 (1985). This rule applies to cases originally filed in state court and removed to federal court. *Associated General Contractors* v. *Otter Tail Power Co.*, 611 F.2d 684, 686, 691-94 (8th Cir. 1979) (state law claims preempted).

Particularly in the case now under review, the application of federal law criteria to the standing issue was necessary to effectuate the federal purpose of furthering research with animals with the objective of curing the "afflictions of mankind," and precluding interference with scientists engaged in animal research.

These clearly articulated federal objectives were emphasized in the Fourth Circuit *IPPL* case. The court stated:

> "The Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.*, is the federal statute on which plaintiffs rely in defining their allegations of mistreatment. The Act seeks to insure that 'animals intended for use in research facilities . . . are provided humane care and treatment.' 7 U.S.C. § 2131(1). There is no indica-

tion, however, that Congress intended this goal to come at the expense of progress in medical research. To the contrary, both the language of the statute and the means chosen by Congress to enforce it preserve the hope that responsible primate research holds for the treatment and cure of humankind's most terrible afflictions. The statutory design is, in turn, inconsistent with the private right of action that plaintiffs assert. A review of the Act thus underscores two points. One is a commitment to administrative supervision of animal welfare. The other is the subordination of such supervision to the continued independence of research scientists. The Secretary's rule-making authority does not extend to the design of experiments; the Secretary's enforcement authority does not extend to the confiscation of animals in use. In the words of Congress, 'Under this bill the research scientist still holds the key to the laboratory door.' H.R. Rep. No. 91-1651, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 5103, 5104. *See also* S. Rep. No. 1281, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 2635, 2637.

> "The *amicus curiae* brief of sixty-eight scientific and medical organizations reviews the history underlying these priorities. Research with primates helped to lead, for example, to the development of the polio vaccine, and other animal research has contributed to the discovery of insulin, the invention of transplantation techniques, and the improvement of cancer therapies. *Amici* predict that animal research will play some part in the prevention and treatment of such illnesses as multiple sclerosis, AIDS, and Alzheimer's disease. Recent amendments to the Animal Welfare Act have accordingly reaffirmed the Congressional finding that 'the use of animals is instrumental in certain research and education or for advancing knowledge of cures and treatments for diseases and injuries which afflict both humans and animals.' H. Conf. Rep. No. 99-447, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Ad. News 1676, 2518.

> "Consistent with this purpose, Congress crafted a comprehensive plan for the regulation, inspection, and sanction of medical facilities that utilize animals in research. It is clear that the supervisory goals of the statute were to be realized through a regime of administrative enforcement, with the right of judicial review for an aggrieved facility. 7 U.S.C. § 2149(b). *It is equally clear that these goals were not to be realized through a succession of private lawsuits.*" 799 F.2d at 939-40. (Emphasis supplied.)

In order to protect the federal interest described in *IPPL*, federal preemption of inconsistent state law is clearly required. This Court in *Boyle* v. *United Technologies Corp.*, 482 U.S. 500 (1988), a case involving the government contractors' liability in tort to third parties, set forth as follows the considerations applicable to the displacement of state law.

> "Displacement will occur only where, as we have variously described, a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation. . . The conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which States have traditionally occupied.' . . . Or to put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce preemption into one that can. But conflict there must be. In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. . . . In others, the conflict is more narrow, and only particular elements of state law are superseded." 487 U.S. at 507-08 (citations and footnotes omitted).

Viewed in this context, the federal policy of funding animal research in an effort to cure illness, maintaining

the independence of research scientists and precluding private lawsuits under the Animal Welfare Act in favor of administrative enforcement of animal care in research facilities, would be frustrated if litigants, such as petitioners, had standing to bring lawsuits based on state tort and nuisance laws to secure custody of research animals or to otherwise disrupt ongoing research.[3] Under the Animal Welfare Act, the Secretary of Agriculture is precluded from promulgating regulations "with regard to the design, outlines, or guidelines of actual research or experimentation by a research facility . . . or orders with regard to the performance of actual research or experimentation." 7 U.S.C. § 2143 (1982) (codified as amended at 7 U.S.C. § 2143(a)(6)(a)(i)(ii) (Supp. V 1987)). In addition, the Act provides that nothing "shall authorize the Secretary, during inspection, to interrupt the conduct of actual research or experimentation." *Id.* at (iii).

It is therefore clear that petitioners were seeking custody of privately owned research animals entrusted to NIH, relief which would not even be available to the Secretary of Agriculture under the Animal Welfare Act since granting it would serve "to interrupt the conduct of actual research or experimentation."

Under the Animal Welfare Act "the research scientist holds the key to the laboratory door." *IPPL*, 799 F.2d at 939. It would be inconsistent with this policy to hand out additional keys to animal rights activists permitting them to interrupt animal research by asserting causes of action based on state law to secure custody of privately owned, federally funded research animals.

The Fifth Circuit, after removal, properly applied Art. III standing concepts to the Petition for Declarative and/or Injunctive Relief.

---

[3] Federal preemption is equally applicable to state law causes of action against scientists engaged in animal research asserted in state courts.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EDGAR H. BRENNER *
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Attorney for Respondent Institutes for Behavior Resources, Inc.

Of Counsel
RAYMOND D. KLINE

October 31, 1990

* Counsel of Record

APPENDICES

APPENDIX A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

No. 88-24949 Division C Docket 5

INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*

versus

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, *et al.*

TEMPORARY RESTRAINING ORDER

Considering the above and foregoing verified petition for temporary restraining order and preliminary and permanent injunction, and for good cause shown,

IT IS ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the "Silver Spring Monkeys", placed in their keeping by the National Institute of Health and/or the Institute for Behavioral Research,

IT IS FURTHER ORDERED that Petitioners post security in the amount of $15,000.00.

IT IS FURTHER ORDERED that Petitioners' request for Preliminary Injunction be, and the same is hereby

set for hearing on the 6th day of January, 1989, at 10: o'clock, A.M.

THUS DONE AND SIGNED this 29th day of December, 1988, New Orleans, Louisiana.

/s/ [Illegible]
Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 88-5713

Section: L Mag. 2

INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, *et al.*

MOTION AND ORDER FOR TEMPORARY RESTRAINING ORDER

[Filed June 5, 1989]

NOW COME plaintiffs International Primate Protection League (IPPL), People for the Ethical Treatment of Animals (PETA), and Louisiana in Support of Animals and move the Court for a temporary restraining order enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the "Silver Springs Monkeys."

Date of Entry Jan. 3, 1989

/s/ Margaret Woodward
MARGARET E. WOODWARD
Bar No. 13677
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: 504-525-9538
Attorney For

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January 1989 a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails properly addressed to his her or its counsel of record, first class postage, prepaid.

/s/ Margaret E. Woodward
MARGARET E. WOODWARD

TEMPORARY RESTRAINING ORDER

Considering the verified petition for temporary restraining order and preliminary and permanent injunction, and for good cause shown,

IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the "Silver Springs Monkeys."

This order to remain in effect through midnight, February 1, 1989, unless otherwise terminated.

THUS DONE AND SIGNED this 6th day of January, 1989, New Orleans, Louisiana.

/s/ Veronica D. Weicker
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 88-5713

INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, *et al.*

DECLARATION OF WILLIAM F. RAUB, PHD.

WILLIAM F. RAUB declares:

1. I am the Deputy Director of the National Institutes of Health (NIH). I have served in that capacity since August 1986. I began work with the NIH in 1966 and have served in various jobs of increasing responsibility since that time. In 1979, I was appointed the Associate Director for Extramural Research and Training. During my tenure in that position, I was responsible for all NIH activities involving the nonhuman primates that are popularly known as the "Silver Spring Monkeys." That responsibility continued when I was appointed Deputy Director. Accordingly, I have thorough knowledge of the NIH actions and responsibilities regarding those animals.

2. On October 9, 1981, the Circuit Court for Montgomery County Maryland ordered that all primates seized by the Montgomery County Police from the Behavioral Biology Center for the Institute for Behavioral Research (IBR), the owner of the monkeys, be placed in the care

and custody of the NIH. A copy of that order is attached hereto as Exhibit A. By its terms, the order remained in effect until further order of the court or termination of the pending criminal prosecution against Dr. Taub, the chief investigator for IBR. On October 14, 1981, NIH took custody of the monkeys and began caring for them at its animal facility in Poolesville, Maryland.

3. On December 2, 1981, the District Court for Montgomery County convicted Dr. Taub on six counts of animal cruelty. Five of the six counts were later overturned by the Circuit Court for Montgomery County. On August 10, 1983, the Maryland Court of Appeals overturned the remaining criminal conviction of Dr. Taub. This terminated the criminal prosecution against Dr. Taub and thus, the order placing the animals in the care and custody of NIH expired on that date. However, NIH continued to care for the animals in order to maintain the status quo pending resolution of the suit seeking custody of the monkeys brought by the International Primate Protection League, The People for the Ethical Treatment of Animals and other groups and individuals in the Federal District Court for the District of Maryland.

4. During the spring of 1986, while the litigation was pending before the United States Court of Appeals for the Fourth Circuit, many members of Congress and the general public urged the NIH to turn the monkeys over to a private primate facility that does not endorse animal experimentation. The NIH determined that it could not do so in view of the significance of the pending litigation, indications that the facility in question did not meet even the minimum requirements of the Animal Welfare Act and the absence of authority to act independently of the owner of the monkeys, the Institutes for Behavioral Resources, Inc., the successor organization of the IBR. In order to respond as best it could to the

strong expression of public interest, the NIH proposed that the IBR monkeys be excepted from further invasive research, be allowed to live in a first-class facility and be resocialized to the extent possible. Because NIH facilities are not fully suitable for such a resocialization attempt, the monkeys were transfered on June 23, 1986 to the Delta Regional Primate Research Center in Convington, Louisiana. Although NIH notified the other parties in the litigation and the United States Court of Appeals for the Fourth Circuit of the move on the day it occurred, the decision to move the animals was made by the NIH on the basis of its responsibility for the care of the monkeys.

5. On the date of the transfer, NIH forwarded a letter of agreement to the Chancellor of the Tulane University School of Medicine, which operates the Delta Center. A copy of that agreement, signed by the Chancellor, is attached hereto as Exhibit B. The agreement states that "the Delta Center is acting strictly as an aide to NIH in its role as . . . custodian [for the monkeys]." The agreement further requires Delta to consult with NIH regarding all clinical care decisions except routine or emergency clinical procedures.

6. During the period the monkeys were cared for at the NIH Poolesville facility, NIH incurred costs of $51,860. These costs were paid by the NIH because the court order placing the animals in the custody of NIH made no provision for payment by any other party, and NIH viewed itself as providing a public service at the behest of the court. During the period the monkeys have been cared for at the Delta Center, Delta has charged NIH $45,086.14 for care and maintenance, security, administrative costs and miscellaneous supplies. To date, IBR has reimbursed NIH $29,622.54 for these costs, stating that it will reimburse NIH only for the standard daily charge of $1.82 for each animal.

7. On September 1, 1987, five of the monkeys that had not had surgery were transferred to the San Diego Zoo in order to complete the resocialization process begun at the Delta Center. Attached as Exhibit C is a copy of the July 21, 1987 letter confirming the agreement between NIH and the San Diego Zoo. As stated in the letter agreement, NIH took this action in its role as custodian of the primates owned by the IBR.

8. As custodian of the animals, NIH will continue to exercise its best judgment to carry out its plan, developed in consulation with experts in veterinary care, rehabilitation medicine and primate behavior, that: (1) the unoperated animals be introduced into group-living arrangements appropriate to maintaining their long-term well-being; and (2) the experimentally disabled animals be cared for individually until euthanasia is required because of significant pain or distress or they die of natural causes. To date, IBR has acquiesced to NIH retaining custody and control of the animals and to the actions NIH has taken to carry out its plan.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: 1-27-89

/s/ William F. Raub
WILLIAM F. RAUB, PH.D.
Deputy Director, NIH

Supreme Court, U.S.
FILED
OCT 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-89

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, ET AL.,
Petitioners

V.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND IN OPPOSITION

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QUESTIONS PRESENTED

1 Whether petitioners' suit to enjoin research activities related to privately owned laboratory animals was properly dismissed for lack of standing.

2. Whether federal agencies may remove cases pursuant to 28 U.S.C. 1442(a) (1).

NO. 90-89

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, ET AL,
Petitioners

v

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND IN OPPOSITION

The respondent, Administrators of the Tulane Educational Fund, has reviewed the law and arguments contained in the brief for the National Institutes of Health (NIH) in opposition to petitioners' petition for a writ of certiorari of the opinion of the court of appeals. Having reviewed NIH's brief in opposition, respondent, Administrators of the Tulane Educational Fund, hereby adopt and incorporate herein by reference the statement,

law and arguments made by NIH as if they were its own, except that it disagrees with NIH's position that there is a conflict between the circuits as to whether NIH was entitled to remove this case to federal court under 28 U.S.C. 1442(a) (1).[1]

With respect to the issue of whether The National Institutes of Health was entitled to remove this case to federal court, the respondent adopts and incorporates herein by reference the law and arguments made in the opposition brief filed by The Institutes for Behavior Resources, Inc. (IBR). We, like IBR, embrace the position that the Third Circuit's decision in Lovel Mfg., Div. of Patterson-Erie Corp. v. Export-Import Bank of United States, 834 F.2d 725, 733 (1988), is not in conflict with other circuits, but rather, that "the purpose of 1441 removal is to protect federal officials from unfriendly state forums... for conduct performed under color of federal office..." Thus, we embrace IBR's position that removal under 1442(a) (1) is proper where injunctive relief is specifically sought against officers of a federal agency. Clearly, the relief sought by petitioners was to enjoin NIH officials from participating in the euthanasia protocol of the Silver Spring Monkeys at Tulane's Delta Primate Reserach Center.

As to the principal issue of whether petitioners have standing to enjoin research activities related to privately owned animals, the interests of the Administrators of the Tulane Educational

---

[1] See brief for The National Institutes of Health in Opposition at pg. 11, para. 2.

Fund are so closely linked to those of NIH, that we adopt and incorporate by reference all other arguments made by NIH.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been forwarded to all counsel of record by depositing same in the U.S. mail, postage prepaid and properly addressed this 30th day of October, 1990.

_____
GREGORY C. WEISS

(5)

NO. 90-89

SUPREME COURT, U.S.
FILED
JAN 9 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS
Petitioners

V.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

DATE	Pleading/Proceeding
12/28/88	Petition for Declaratory and/or Injunctive Relief filed in State Court
12/28/88	State Court issuance of temporary restraining order against Tulane
12/30/88	Removal Petition filed by NIH
1/6/89	Temporary restraining order entered against Tulane and NIH by federal district court
1/12/89	Plaintiffs move for remand
1/13/89	Amended Removal Petition filed by NIH
1/17/89	Second Amended Removal Petition filed by NIH
1/18/89	Opposition to Motion to Remand filed by NIH
2/1/89	Denial of Motion to Remand
4/12/89	Denial of NIH's second Motion to Dismiss
4/12/89	Notice of Appeal by NIH from denial of Motion to Dismiss
5/2/89	Motion for an Indicative Ruling by NIH
5/3/89	Denial of Indicative Ruling; TRO continued in effect
5/19/89	Notice of Appeal by NIH from denial of indicative ruling
7/5/89	Plaintiffs' Motion to Dismiss Appeal
8/9/89	Denial of Motion to Dismiss Appeal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Received Dec 30 88

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	No. 88-5713
V.		
	*	SECTION: "L" Mag. 2
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	

* * *

PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA:

Petitioners, The National Institute of Health, and the Deparatment of Heaith and Human Services, through the United States of America, represented herein by the undersigned Assistant United States Attorney, respectfully represent:

I.

Petitioner, The National Institute of Health, an agency in the Department of Health and Human Services, has been made a defendant in the above-captioned civil action now pending in the Civil District Court, parish of Orleans, State of Louisiana, No. 88-24949, Division "H".

II.

The above-captioned action is one which may be

removed without bond to this Court pursuant to Title 28, United States Code, Section 1442(a), for the reason that your petitioner, The National Institute of Health, is an agency of the United States of America, and the Federal District Courts have original jurisdiction over all actions commenced against such federal agencies.

III.

The above-captioned action is one which may be removed without bond to this Court pursuant to Title 28, United States Code, Section 1446(d).

IV.

Petitioner, The National Institute of Health, through the United States of America, files herewith a copy of all pleadings which to the best of its information have been filed in the State Court action.

WHEREFORE, the petitioner prays that the above-captioned action now pending in the Civil District Court, Parish of Orleans, State of Louisiana, be removed therefrom to this Honorable Court.

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Ruth Morris Force

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LA Bar Roll No.: 5683

NOTE:CERTIFICATE OMITTED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Received - Jan 12 89

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	NO. 88-5713
VERSUS	*	
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	SECTION "L"

MOTION TO REMAND

NOW INTO COURT through undersigned counsel come plaintiffs International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members and move the Court to remand this action to the Civil District Court for the Parish of Orleans, where it was originally filed, for the reasons set forth in the accompanying memorandum.

/s/ Margaret E. Woodward

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Attorney For Plaintiffs

NOTE: CERTIFICATE OMITTED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	NO. 88-5713
V.	*	
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	SECTION "L"
	*	MAG. 2

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR REMAND

I. *INTRODUCTION*

This is an action brought by plaintiffs, the International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members, for declaratory and/or injunctive relief to prevent the senseless and needless killing of primates who have become known as the "Silver Spring Monkeys." This action initially was filed in Orleans Parish Civil District Court against defendants Administrators of the Tulane Educational Fund, The Institute for Behavioral Resources Inc. (IBR) and the National Institute of Health (NIH). The petition is predicated upon Louisiana state law and state public policy and seeks injunctive relief against the defendants. Monetary damages are not sought because there is no adequate pecuniary standard for the measurement of damages which have been sustained by the plaintiffs as a result of the treatment of these animals and would be sustained if the defendants were not prohibited from needlessly killing the monkeys.

Plaintiffs' petition was filed in the Civil District Court for the Parish of Orleans on December 28, 1988 and on that same date, the Civil District Court issued a temporary restraining order enjoining the Administrators of the Tulane Educational Fund from killing or otherwise conducting any inhumane treatment of the Silver Spring Monkeys.

Two days later, defendant NIH and the Department of Health and Human Services (in which NIH is an agency) petitioned for removal of the state court action to this Court. In support of their authority to seek removal, defendant NIH and HHS cite to 28 U.S.C. Sec. 1442(a). Petitioner NIH contends that it is an agency of the United States of America and that pursuant to Sec.1442(a) federal district courts have original jurisdiction over all actions commenced against such federal agencies.

Plaintiffs respectfully submit that this action is not appropriately removed to federal court and, hence, the case should be remanded to the Civil District Court for the Parish of Orleans pursuant to 28 U.S.C Sec.1447(c). The statute upon which NIH relies, 28 U.S.C. Sec.1442(a), is properly interpreted as conferring original jurisdiction upon federal district courts only in actions commenced against *natural persons who are federal officers.* By its language, the statute does not apply to state court actions in which an *agency* of the United States, rather than an officer or person, is sued. While Sec. 1442 may be subject to a broader interpretation encompassing agencies as well as officers, plaintiffs submit that in light of the language of the statute itself, the statutory history, and its purpose, the proper interpretation of Sec. 1442(a) is that removal

applies only to natural persons.

As set forth in more detail below, remand is appropriate in this instance because (1) the purpose of Sec. 1442(a) is to protect natural persons who are officers of the United States government from state courts' imposing civil or criminal liability against them for actions arising out of their federal duties; (2) plaintiffs' action is solely for injunctive relief against the defendant, including NIH and, therefore, no monetary damages are sought from any person or officer; and (3) plaintiffs' action is predicated upon Louisiana state law and public policy, and the action is directed to the actions and operations of nonfederal defendants.

II. Section 1442(a) Is Properly Interpreted as Applying Only to Actions Where Natural Persons Are Sued.

The statute upon which defendant NIH predicates its petition for removal, Sec. 1442(a), is entitled "Federal Officers Sued Or Prosecuted". That statute provides in relevant part as follows:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following *persons* may be removed by them . . .
>
> (1) Any *officer* of the United States or any agency thereof, or *person* acting under *him*, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. Sec. 1442 (emphasis added).

By its terms, the statute applies to suits against natural persons, not entities of the federal government. In subsection (a), the statute specifically states that an action against any of the following listed "persons" may be removed. Further, in paragraph (1) under subsection (a), the listed person is "any officer" of the United States or any agency thereof. The person may be an officer of the United States or of a United States agency; the right to remove is not given independently to "any agency". *See City of Alma v. Bell, Galyardt and Wells, Inc.*, 606 F.Supp. 686, 689-690 (D. Neb. 1985). That the statute refers to natural persons is emphasized by the fact that the statute states that removal also may be accomplished by a "person acting under him., i.e. any officer. The statutory language clearly demonstrates that removal is limited to suits against natural persons and not other entities of the United States such as a federal agency.

Further, the purpose of the statute is to protect natural persons who are or were federal officers from being sued in state court for actions undertaken as part of their federal duties.[1] There is no indication that the statute was passed to prevent the federal government or any of its agencies in general from being sued in state court. As explained by Professor Moore, the history of Sec. 1442(a) involves concerns over the protection of persons who are federal officers from being sued in state court:

> Subsection (a) of Sec. 1442, which deals with federal officers, is based on former 28 U.S.C. Sec. 76 (1940), Sec. 33 of the Judicial Code of 1911, as amended. The roots of this statue go back beyond

[1] The right of removal is not affected by the fact that the federal officer does not have the status of a federal officer at the time removal is sought. The person need only show such status existed at the time the incident claimed of occurred. *See Camero v. Kostos*, 253 F.Supp. 331 (D. N.J. 1966).

the Force Act of 1833 to the troubled era surrounding the War of 1812. As Justice Marshall stated in *Willingham v. Morgan.*

> The federal officer removal statute has had a long history . . . The first such removal provisions was included in an 1815 customs statute. Act of February 4, 1815, Sec. 8, 3 Stat. 198. It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular.
>
> It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act 'under color' of the statute. Obviously, the removal provision was an attmept to protect federal officers from interference by hostile state court.
>
> This provision, however, was not permanent, it was by its terms to expire at the end of the war.

LA Moore's Federal Practice, Par. 0.164[1] at 379-380 (footnotes omitted)[2]

While the present law broadens coverage to include federal officers other than those involved in the enforcement of the revenue laws, the coverage was broadened to include additional employees, not to include non-natural persons or entities. *Cf. Michigan v. Banning*, 88 F.Supp.

[2] Significantly, the predecessor to paragraph 1 of Sec. 1442(a) was limited to revenue officers engaged in the enforcement of the criminal or revenue laws and those acting under or by their authority. 1A Moore's Federal Practice, 0.164[1] at 380-381.

449, 450 (E.D. Mich. 1950) ("while the present law broadens the coverage by adding many federal employees who may claim immunity from state prosecution, application of the law is still limited to those acts done by those employees 'under color of such office' "). According to Professor Moore:

> [I]n extending the application of [Sec. 1442(a)] paragraph (1) to federal officials and employees generally, the revision [of the Judicial Code of 1948] made no change in the theory or basis for removal that the civil suit or the criminal prosecution must be against the officer or employee, and based upon an act or acts done under color of office, etc.

Id. at 382-384 (footnotes omitted). Significantly, as stated by Moore, "a suit against a government corporation, as distinguished from a suit against a federal official or one acting under him, is not removable under Sec. 1442(a)(1)." *See also Lance International Inc. v. Aetna Cas. & Sur. Co.*, 264 F.Supp. 349 (S.D.N.Y. 1967) (suit against government corporation as opposed to a federal officer or one acting under him is not removable under Sec. 1442(a)(1); *Harlem River Produce Co. v. Aetna Cas. & Sur. Co.*, 257 F.Supp. 160 (S.D.N.Y. 1965). In addition, a proceeding that is wholly in rem also is not removable. *Id. See also New Jersey v. Moriarity*, 268 F.Supp. 546 (D. N.J. 1967).[3]

The petition for removal filed by the NIH and the Department of Health and Human Services raises the issue

[3] Plaintiff's petition for injunctive relief to prevent the senseless killing of the Silver Spring Monkeys closely resembles an *in rem* proceeding inasmuch as the petition raises questions and issues pertaining to the custody of the animals.

of whether an agency of the United States may remove a state court action under Sec. 1442(a) even though no federal officer has been sued. A majority of the federal courts who have considered the question have interpreted the statute as plainly not granting a federal agency such a right. *City of Alma v. Bell, Galyardt & Wells, Inc.*, 606 F.Supp. 686, 689-690 (D. Neb. 1985), *citing Brewer v. Department of Housing & Urban Dev.*, 508 F.Supp. 72, 74 (D. Ohio 1980); *Lowe v. Norfolk & Western Railroad Company*,. 529 F.Supp. 491 (D. I11. 1982); *UCPO Employees Credit Union v. Mitchell*, 421 F.Supp. 1327 (D. Mo. 1976); *California v. Bozarth*, 356 F.Supp. 667 (N.D. Cal. 1973); *Lance Int'l Inc. v. Aetna Cas. & Sur. Co.*, 264 F.Supp. 349 (S.D. N.Y. 1967). *See also Gensplit Finance Corp. v. Foreign Credit Ins. Ass'n.*, 616 F.Supp. 1504, 1509 (E.D. Wis. 1985) (By means of Sec. 1442(a)(1), "Congress intended . . . to protect individuals employed by the [federal] government against suits brought against them in state courts for actions done in the course of their official duties; there was no evident intention to protect government agencies or other [government] entities from such suits.")

In *City of Alma*, the plaintiff City sued the United States Environmental Protection Agency, the Nebraska Department of Environmental Control and other private parties in the Nebraska state court. The EPA removed the action to federal district court, citing 28 U.S.C. Sec. 1442(a). Upon review of the statutory provision and cases interpreting it, the district court concluded that the right of removal rests only in situations where individual officers are sued, not where a federal agency is a defendant. As stated by the court, "Sec. 1442(a)(1) is by its language unavailable to the EPA or the United States as authority for removal, since the EPA was sued only as an agency and no recovery is sought from individual officials." 606 F.Supp. at 690, citing *Lowe*, 529 F.Supp. at 493.

The court in *City of Alma* stated there was no need to so broadly interpret the term "federal officials" in Sec. 1442(a)(1) so as to include a federal agency "since Congress has already provided ample protection against tort suits [and contract suits] for its agencies and the entire government in the Federal Tort Claims Act, [the Tucker Act], and any other claims which could be brought in state court are barred by sovereign immunity." 606 F.Supp. at 690, citing *Lowe*, 529 F.Supp. at 494. On the other hand, the court noted that

> Without 1442(a)(1), a federal officer acting under color of federal office might not be able to adjudicate his or her defenses in a federal court unless there existed other grounds for removal. *Such is not the case with federal agencies.* Other legislation aptly channels actions against agencies into federal forums.

606 F.Supp. at 690 (emphasis added).[4]

Despite the language of Sec. 1442(a) and the statutory history cited above, both of which indicate that the removal provisions should be limited to situations in which a federal officer has been sued, some district courts have concluded that federal agencies may remove under Sec.1442(a)(1), *e.g.*, *Township of Middletown v. N/E Regional Office USPS*, 601 F.Supp. 124 (D. N.J. 1985); *Monal Construction Co. v. Brookside Limited Partnership*, 539 F.Supp. 478 (W.D. D.C. 1982); *James River Apts. v. FHA*, 136 F.Supp. 241 (D. Md. 1955). Moreover, a decision

[4] These other "channels", noted by the court in City of Alma, i.e. the Federal Tort Claims Act, the Tucker Act, and sovereign immunity, of course, only apply to actions in which damages are sought against the federal government or one of its agencies, which is not the case here.

of the Fifth Circuit, *IMFC Professional Services v. Latin American Home Health Inc.*, 676 F.2d 152 (5th Cir. 1982), has been interpreted as permitting removal by federal agencies. *See, e.g., C.H. v. American Red Cross*, 684 F.Supp. 1018, 1023 (E.D. Mo. 1987); *Woodward v. Turnage*, 646 F.Supp. 219, 221 (E.D. Mo. 1986). However, in *IMFC Professional* the Fifth Circuit did not address, much less decide, the issue before this Court, i.e. whether an agency of the federal government, rather than a federal official, may remove under Sec. 1442(a)(1).

In *IMFC Professional*, a state court action was brought against a federal official (Aetna) which had been acting directly under the administrator of the Department of Health and Human Services. HHS intervened as the real party in interest and removed the case to federal court. Plainly, the official could have removed the action under 28 U.S.C. Sec. 1442(a)(1), and because HHS contractually stood in the shoes of a federal official, its removal of the case cannot be construed as an agency removal. In its opinion, the Fifth Circuit did state that "the only prerequisite to removal of a civil action under Sec. 1442 is that it be *brought against* a federal officer of agency." 676 F.2d at 156. In making this statement however, the Fifth Circuit, was not addressing the issue before this Court of whether a federal agency, as opposed to a federal official, may remove. Rather, the court of appeals was addressing the entirely different question of whether in addition to the bringing of an action the "federal court must have subject matter jurisdiction over the claim against the *federal officer*." *Id.* (emphasis added). The circuit court held, quite correctly, that subject matter jurisdiction is not a prerequisite to removal *by a federal officer* under Sec. 1442(a).

In the case at bar, the federal defendants are named solely as federal agencies; no federal officers or individuals

are named. Further, the agencies are defendants in their own right and are not stepping in the shoes of federal officials or intervening in a pending action. As such, the reasoning of the Fifth Circuit in *IMFC* does not apply. *IMFC Professional*, therefore, should not be interpreted as expanding the scope of Sec. 1442(a) to include the right of removal by agencies of the federal government, where federal officers have not been sued.[5]

III. Federal Court Is An Inappropriate Forum For The Resolution Of This Case.

Not only is remand of this case appropriate because Sec. 1442(a) is inapplicable to suits against federal agencies, there are additional reasons why this litigation is best addressed in state court; (a) state law and nonfederal defendants predominate in this lawsuit; and (b) public policy dictates that as this suit is only for injunctive relief and not damages, the United States government does not require the protection of the federal courts.

A. State Law and Non-Federal Defendants Predominate in This Lawsuit.

Presently, the monkeys are held at Tulane University. As such, any injunctive relief would be immediately effective against Tulane. The monkeys are allegedly owned

[5] In subsequent case, *Smith v. City of Picayune*, 795 F.2d 482 (5th Cir. 1986), the court of appeals, *in dicta*, cited to *IMFC Professional* in support of the proposition that the Farmers Home Administration could remove a state court action to federal district court under Sec. 1442(a)(1). As in IMFC, the court of appeals in *Smith* did not directly address the issue of whether an agency as opposesd to a federal official may remove under the statute.

by IBR, a private corporation. The federal government's interest in the animals derives from the initial research grant that was withdrawn years ago. On previous occasions, the NIH has declared its lack of interest in the monkeys rendering its present interest in this litigation questionable. The federal government has not demonstrated how it would be affected by injunctive relief. Further, this action is bottomed solely on state law. The combination of a predominant state defendant and state causes of action makes the Louisiana state courts the best forum for this action.

B. Public Policy Dictates That This Action Be in State Court.

Removal statues, such as section 1442(a)(1), have been viewed as a means to prevent state courts from imposing personal monetary liability or criminal penalties upon individual federal officers for actions arising out of their federal duties. *See Tennessee v. Davis*, 100 U.S. (10 Otto) 257 (1880); *Arizona v. Manypenny*, 451 U.S. 232 (1981). Even if Sec. 1442(a) were interpreted as applying to federal agencies, in an action such as this, where the only relief sought is injunctive, the protections provided by the removal statute are not needed. In *Arizona v. Manypenny*, 451 U.S. at 241-242, the Supreme Court stated:

> [h]istorically, removal under Sec. 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties . . . it also enables the defendant to have the validity of his immunity defense adjudicated in the federal forum.

In the case at bar, however, the remedy requested is solely injunctive relief against a federal *agency*. There is no individual criminal action or civil liability involved, so sovereign immunity would not become an issue. Moreover, the actual entity affected by the injunction, Tulane University, is a state, not federal actor. For these reasons, public policy and judicial economy suggest that this case should be pursued in state court.

CONCLUSION

For the above mentioned reasons, plaintiffs ask this court to remand the action to the Civil District Court for the Parish of Orleans.

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NOTE: CERTIFICATE OMITTED

NOTE: HEADING OMITTED

AMENDED PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA:

The United States of America, petitioner herein, hereby amends its Petition for Removal filed on December 30, 1988, in order to correct a typographical error in Paragraph II thereof. Said paragraph is amended to read:

II.

It is readily apparent that there was a typographical error in Paragraph II since the reason stated for removal in the original petition uses the language of Title 28, United States Code, Section 1441(a) rather than that of Section 1442(a).

Respectfully submitted,

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NOTE: CERTIFICATE OMITTED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	CIVIL ACTION
versus	No. 88-5713
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	SECTION L (2)

SECOND AMENDED PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA:

The United States of America and the Department of Health and Human Services, petitioners herein, hereby amend the Petition for Removal filed on December 30, 1988 and the Amended Petition for Removal filed on January 13, 1989, in order to add 28 U.S.C. § 1442(a) as an additional basis for removal of this action. Paragraph II is hereby amended to read:

II.

The above-captioned action is one which may be removed without bond to this Court pursuant to Title 28, United States Code, Section 1441(a), for the reason that your petitioner, the National Institute of Health, is an agency of the United States of America, and the Federal District Courts have original juirisdiction over all

actions commenced against such federal agencies and, also, under Title 28, United States Code, Section 1442(a) because it is a federal agency.

Respectfully submitted,

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/s/ Ruth Morris Force

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Received Jan 13 89

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	No. 88-5713
v.		
	*	SECTION "L" (2)
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	

* * *

OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

On December 28, 1988, a petition for declaratory and/or injunctive relief was filed in Louisiana State Court, Civil District Court for the Parish of Orleans, against the National Institutes of Health, among others, seeking to enjoin the federal agency from performing final experimentation on three primates owned by the Institutes for Behavior Resources (IBR)[1] and in the custody of the National Institutes of Health. The action was removed to Federal District Court by the United States pursuant to 28 U.S.C. §1441(a), which provides for removal to the district court of the United States of "any civil action brought in

[1] Its name was changed from Institute for Behavioral Research, Inc.

a state court of which the district courts of the United States have original jurisdiction," and pursuant to 28 U.S.C. §1442(a), which permits removal of any civil action brought against an "officer of the United States or any agency thereof." Plaintiffs have filed a Motion to Remand which should be denied as removal is proper in this case.

REMOVAL UNDER 28 U.S.C. §1441(a)

The National Institutes of Health (NIH) is an agency of the Public Health Service, which in turn is under the Department of Health and Human Services. 42 U.S.C. §§203 and 281; 5, App.1, Reorg. Plan No. 3 of 1966. By statute, 28 U.S.C. §1441(a), "any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district embracing the place where such action is pending." This same suit was in fact heard, on removal, in federal district court and affirmed on appeal. *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986). The suit was removed from state court to the United States District Court for the District of Maryland. As noted by the Fourth Circuit, Court of Appeals, plaintiffs did not oppose removal. 799 F.2d at 937. The district court retained jurisdiction over the suit and adjudicated the matter. "The finding of jurisdiction is considered to be *res judicata* of the issue." Wright, *The Law of Federal Courts*, 4th ed., §16, p. 84. If there was jurisdiction in the United States District Court for the District of Maryland on removal, there was original jurisdiction to bring suit there in the first place and, therefore, original jurisdiction for suit in this court now. This second action is removable under 28 U.S.C. §1441(a).

REMOVAL UNDER 28 U.S.C. 1442(a)

Although disputed in the Memorandum in Support of Plaintiffs' Motion to Remand, it is clearly the law of the Fifth Circuit that when a federal agency is sued in state court the suit against it can be removed under 42 U.S.C. §1442(a). *IMFC Professional Services of Florida v. Latin American Home Health*, 676 F.2d 152, 156 (5th Cir. 1982). This is so because the Fifth Circuit gives meaning to the clear language of the statute which states that a civil action commenced in state court against "[a]ny officer of the United States *or any agency thereof . . .*" *may be removed to the United States District Court. This position was reiterated by Judge Rubin in Smith v. City of Picayune*, 795 F.2d 482, 485 (5th Cir. 1986), and followed by Judge Polozola in *Ewell v. Petro Processors of Louisiana, Inc.*, 655 F.Supp. 933 (M.D.La. 1987). The *Ewell* case involved removal from state court to Federal District Court by the Environmental Protection Agency and the court specifically found removal proper under Section 1442(a). This second suit is also removal under 28 U.S.C. §1442(a).

FEDERAL LAW PREDOMINATES

Contrary to the facts presented by plaintiffs, the one defendant in this action with no real interest in it is Tulane University. They own the facility where the monkeys are being housed. The monkeys are owned by IBR and are in the custody of NIH. There is no reason, although no intention to do so, why NIH and IBR could not move the monkeys. The only effective injunctive would be one against them. NIH is an agency of the United States. An injunction against NIH is an injunction against the United States. The United States as sovereign possesses sovereign immunity and, it is well settled, cannot be sued without its consent. *Lehman v. Nakshian*, 453 U.S. 156 (1981);

U.S. v. Mitchell, 445 U.S. 535 (1980). The United States has not consented to be sued under any of the Louisiana statutes mentioned in plaintiffs' petition. This is a suit which allegedly seeks to obtain humane treatment for animals intended for use in research facilities under the direction of NIH. As noted by the Fourth Circuit, the Animal Welfare Act, 7 U.S.C. §§2131 *et seq.* is the implicated statute. 799 F.2d at 938. It is through this statute that Congress sought to insure that "animals intended for use in research facilities . . . are provided humane care and treatment." 7 U.S.C. §2131(1). It is clear that plaintiffs seek to ignore this Act in this second suit since the Fourth Circuit held, against them, that the statutory design of the Animal Welfare Act is "inconsistent with the private right of action that plaintiffs assert." 799 F.2d at 939. Nevertheless, federal not state law predominates in this case.

FEDERAL POLICY CONTROLS THIS ACTION

Contrary to the position taken by plaintiffs, the fact that this suit seeks injunctive relief against the United States rather than damages makes it more crucial that the case be heard in federal court. As previously stated, this suit against NIH is a suit against the United States because the United States is the real party in interest. *Serra v. U.S. General Services Admin.*, 667 F.Supp. 1042, 1046 (S.D.N.Y. 1987). With respect to injunctions against the United States the Supreme Court has said:

> The Congress has increasingly permitted [suits for damages] to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the government.

> It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign.

Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1948). It is clear that in a case where "the remedy requested is solely injunctive relief against a federal agency." [Memorandum in Support of Plaintiffs' Motion for Remand - last page] federal policy is the same as public policy. The case should be decided by a federal court.

For the foregoing reasons, it is contended that the Court should deny plaintiffs' Motion to Remand this action to state court.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

Received JUL 1989

No.89-3288

International Primate Protection League, et al.

Administrators of Tulane Education Fund, et al.

MOTION TO DISMISS APPEAL

NOW COME plaintiffs, International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana In Support of Animals and its members, through undersigned counsel, and move to dismiss the appeal in the captioned matter, on the ground that no appeal lies from the interlocutory orders at issue, as more fully set forth in the accompanying memorandum.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

No. 89-3288

International Primate Protection League, et al.

Administrators of Tulane Educational Fund, et al.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

This memorandum is respectfully submitted by plaintiffs, International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and it members, in support of their Motion to Dismiss the appeal filed by the National Institutes of Health ("NIH") and the Administrators of the Tulane Educational Fund ("Tulane"). Both parties appeal from orders entered by the District Judge denying the NIH's Motion to Dismiss on April 12, 1989 and its Motion for an Indicative Ruling[1] on May 3, 1989. Because those were interlocutory orders an appeal may not be taken therefrom and this Court lacks jurisdiction over this appeal.

[1] After the filing its notice of appeal from the denial of its Motion to Dismiss, the NIH asked the district court to indicate whether it would be willing to dissolve the temporary restraining order that had been in effect since December. The court properly observed that the motion was procedurally defective, but that if the NIH was withdrawing its prior consent to the Temporary Restraining Order, a preliminary injunction hearing would be conducted promptly in the event of remand by this Court. (transcript, hearing May 3, 2989, p.)

Federal courts of appeals are courts of limited jurisdiction, having only that authority either endowed by the Constitution or conferred by Congress. See e.g., *United States v. Garner*, 749 F.2d 281, 284 (5th Cir. 1985), supplemented 752 F.2d 116 (1985). Accordingly, the threshold question in this case is whether the District Court's order is in fact appealable. *Id.*

Congress has vested the Courts of Appeals with "jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. Section 1291 (emphasis supplied). This requirement of finality has been called "an historic characteristic of federal appellate procedure." *Flanagan v. United States*, 104 S. Ct. 1054, 79 L.Ed. 2d 288 (1984) (quoting *Cobbledick v. United States*, 309 U.S. 323, 324, 60 S. Ct. 540, 541, 84 L.E.D. 783 (1940)). The final judgment rule serves a number of important interests, including preservation of the respect due trial judges by minimizing appellate court interference, reduction of the ability of litigants to harass opponents, and avoidance of clogging the appellant courts by successions of costly and time consuming appeals. *Flanagan v. United States, supra*, 104 S. Ct. at 1054; *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S. Ct. 669, 673, 66 L.Ed. 2d 571 (1981). Thus, the Supreme Court has consistently held that as a general rule, an order is final only when a court" ends the litigation on the merits and leaves nothing for the court to do but execute judgment." *Firestone Tire and Rubber Co. v. Risjord, supra*, 101 S. Ct. at 673; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S. Ct. 2454, 2457, 57 L.Ed. 2d 351 (1978).

Congress had adopted several exceptions to this strict requirement of finality, which, for the reasons set forth above, are themselves to be strictly construed.

Several of these exceptions are codified in 28 U.S.C. Section 1292 (a), on which Tulane and the NIH purport to base their appeal. That paragraph provides:

> Except as provided in subsections (c) and (d) of this section, the courts of appeals whall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Courts of the district of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had to the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

The order in question, denying the NIH's motion to dismiss, does not fall within any of the listed categories of appealable interlocutory orders. Thus, an appeal is not proper at this time.

Tulane and the NIH may argue that because this is an action in which a temporary restraining order has issued, the denial of the NIH's motion to dismiss might be viewed as "granting, continuing, . . . or refusing to dissolve

. . . injunctions. . .". Under 28 U.S.C. Section 1292 (a)(1) courts of appeals have jurisdiction over such orders. However, the term "injunction", is understood not to encompass temporary restraining orders. It is well settled that the issuance of temporary restraining orders and related rulings are not appealable. *Smith v. Grady*, 411 F.2d 186 (5th cir. 1969); *Chandler v. Garrison*, 394 F.2d 828 (5th Cir. 1967).

The captioned appeal from the denial of the NIH's motion to dismiss, and motion for an indicative ruling was not properly taken and is due to be dismissed. The case should be remanded so that the district Judge may conduct a hearing on plaintiffs' request for a preliminary injunction.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record by depositing same in the U.S. mail, postage prepaid, this 5th day of July, 1989.

By:/s/ Margaret Woodward

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

NO. 89-3288

FILED - AUG - 1 1989 RECEIVED AUG - 1 1989

International Primate Protection League, et al.

v.

Administrators of Tulane Educational Fund, et al.

REPLY TO NIH'S OPPOSITION TO MOTION TO DISMISS APPEAL

This memorandum is respectfully submitted by plaintiffs the International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members, in response to the opposition[1] filed by the National Institutes of Health ("NIH") to plaintiffs' motion to dismiss the pending appeal.

I. Summary of the Argument

In brief, the NIH presents this as "an important case that threatens the freedom of . . . the [NIH] and of other

[1] Plaintiffs filed their motion to dismiss the appeal on July 5, 1989, and it was submitted without argument on July 13, 1989. Without notifying plaintiffs, NIH obtained this Court's permission to file its opposition to the Motion to Dismiss as part of its brief on the merits. This reply is to the argument made in NIH's "statement of jurisdiction" at pp. 1-4 of its brief.

federal medical research agencies to carry out important animal research designed to improve the quality of health care for the people of this country and the world." (NIH brief, unnumbered page 1). Having framed the issue as the choice between medical research and world health care on the one hand, and plaintiffs' unreasoning opposition to these lofty goals on the other, the NIH implicitly relegates plaintiffs to a lunatic fringe group that would oppose "important research procedures" carried out "in a nonpainful manner." *Id.* The NIH's self-styled role as the defender of world health against the attack of the bedlamites begins to weaken when the NIH implicitly includes the district court, which allegedly issued a preliminary injunction in plaintiffs' favor, among the attackers.

Neither plaintiffs nor the district court pose a threat to world health. The factual issues are not as the NIH has posed them; the NIH's rightful place in this litigation is subject to grave question; federal jurisdiction over this removed action is subject to grave question; discovery on the preceding issues has just been commenced; the district court **has not granted a preliminary injunction**; and the NIH has simply "appealed" from the district court's questioning of its statement of facts, its proper role in the litigation, and the presence of federal jurisdiction over this action, which was filed in state court on the basis of state law claims.

What the NIH is seeking to do by this "appeal" is to have this Court dismiss the plaintiffs' action with prejudice, without having to respond to discovery aimed at determining whether the federal courts even have jurisdiction over the case. Although the district court ordered discovery to proceed on this issue pending the "appeal", (see attachment A) defendants have refused to respond to plaintiffs' discovery and a motion to compel is now pending

in the district court (see attachment B).

This case is not ripe for appeal, both because defendants have appealed from interlocutory orders and because discovery has not been completed concerning the federal courts' basis for jurisdiction.

II. Statement of Facts

On September 11, 1981, Maryland police officers executed a warrant at the Silver Spring facility of the Institute for Behavioral Research ("IBR"), a private research concern, and seized from the premises seventeen macaque monkeys who have since become known as the "Silver Spring Monkeys". The appalling conditions in the laboratory and the unjustifiably cruel treatment to which the animals were subjected (including the "toxic stimuli avoidance test" in which electrical shocks were applied repeatedly to the animals' testicles to determine whether they would attempt to avoid the "stimuli"[2]) resulted in the criminal prosecution of Dr. Taub, the principal investigator conducting the experiments.[3]

The NIH, which had funded the experiments on the Silver Spring Monkeys, withdrew IBR's grant. During the prosecution of Dr. Taub, custody of the monkeys was temporarily placed in some of plaintiffs, and later in NIH.

---

[2] They did, but the experiments were continued nonetheless.

[3] Dr. Taub was convicted of multiple counts of animal cruelty. His convictions were later set aside because the Maryland statute was found not clearly to apply to scientific research. *Taub v. State of Maryland*, 296 Md. 439, 482 A. 2d 8191983). The Maryland legislature then amended the statute to express its clear intention that the statute should be applied to researchers. Md. Code, art. 27, Sec. 59 (Amended 1984).

Animal rights groups, including some of the plaintiffs in this action, filed separate actions in Maryland state courts and in the federal district court for the District of Columbia. In both actions, the plaintiffs attempted to enforce the provisions of the federal Animal Welfare Act,[4] 7 U.S.C. Sec. 2131 *et seq.* Specifically, the plaintiffs sought to enjoin the return of the silver spring Monkeys to IBR. *The NIH responded that it lacked the authority to prevent the transfer because the monkeys belonged to IBR.*[5]

In correspondence back and forth between NIH and IBR, each party attempted to deliver the monkeys to the other, each claiming it had no need or use for the monkeys. (See attachments C & D, attached as exhibits A & B to plaintiffs' "Memorandum in Opposition to Defendants' Motion to Dismiss and in further support of Plaintiffs' Motion to Remand"). The NIH declared, "we have no research protocols, either ongoing or planned, for which these animals are appropriate", (attachment D). Neither NIH nor IBR would agree to deliver the animals to the plaintiffs, however, presumably because of the threat animal rights organizations are perceived to pose to mnedical research, whether or not such concerns are even implicated.

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[4] In the state court action, the plaintiffs also asserted state law claims. That action was removed to the Maryland District Court, where a magistrate ruled that the plaintiffs lacked standing to enforce the federal statute. The ruling was affirmed on appeal, *International Primate Protection League, et al. v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986). The court declined to exercise pendent jurisdiction over the state claims, which were therefore never addressed. *Id.*

[5] In brief, the NIH argued: "NIH has no summary authority to recover the monkeys even in the event that it terminates funding of the research project." Memorandum in Support of Motion to Dismiss, p. 18, The Humane Society of the United States v. Black, No. 81-2691 (USDC for the District of Columbia).

While IBR, NIH, and plaintiffs were discussing custody of the monkeys, the Maryland state court order vesting custody in the NIH **expired under its own terms.**[6] Nevertheless, the NIH retained the monkeys at the taxpayers' expense, now exceeding $67,000.00. (See Affidavit of William Raub, attached to NIH's reply to opposition to motion to dismiss (No.1)), and had them transferred to Tulane's Delta Regional Primate Center, as public outcry over the NIH's conduct intensified and congressional demands rose for the animals' transfer to any of the several private sanctuaries willing to accept them at no expense to the government. See e.g. attachment E *en globo* (attached as exhibits D & E to plaintiffs' opposition to motion to dismiss and support of motion to remand). In June of 1986, the NIH assured interested congressmen that the animals would not undergo invasive research procedures, but would live out their natural lives under "strict standards designed to promote their health and well-being;" upon their **natural** deaths, the animals were to be autopsied. (Letter of June 9, 1986, Dr. James Wyngaarden, Director NIH, to Congressman Robert Smith; attachment F, here and to opposition to motion to dismiss.)

In December of 1988, the NIH startled plaintiffs and their congressional supporters with the announcement that they intended to euthanize three of the animals immediately. The NIH is now claiming that although it has no use for the animals in life, it has discovered some basis for experimentation on them after their deaths. The NIH admits

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[6] The order stated: "This Order, . . will remain in effect until further Order of this Court or the termination of the pending proceeding against Dr. Taub, whichever occurs first." (See Exhibit A to NIH's reply to opposition to motion to dismiss (No.1)). There was no further order of the court and as noted in footnote 3, *Supra*, the Taub prosecution was concluded in 1983.

that this newfound experimental purpose does not call for the euthanasia of the animals. It claims to have made the euthanasia decision **entirely independent of considerations of medical research** and based on an unsubstantiated allegation that the animals are in pain. It is that decision which plaintiffs have challenged. Plaintiffs have made no attempt to interfere in the planned post-mortem research offering to preserve the animals for testing following their **natural** deaths.

When the NIH announced the planned euthanasia, the instant suit was promptly filed asserting a number of state law claims. Although plaintiffs questioned the NIH's legal interest in the matter, they named as a defendants IBR, the owner, Tulane, the physical custodian, and NIH because NIH claimed responsibility for the decision to euthanize. On December 29, 1988, a civil district court Judge issued a temporary restraining order prohibiting euthanasia of any of the monkeys.

The NIH removed the case to federal court and plaintiffs moved unsuccessfully to remand. Shortly after the removal, counsel for plaintiffs and NIH met with the district court to discuss extension of the Temporary Restraining Order issued by the state court. Counsel for the NIH advised the court that she intended to bring a motion to dismiss based on *res judicata*; she further stated that she had no objection to the court's maintaining the *status quo* pending disposition of the motion to dismiss. The NIH fixed the hearing on its Motion to Dismiss on February 1, 1989. When the motion was denied on that date, the NIH requested and was granted leave to file a renewed Motion to Dismiss emphasizing different issues. It fixed the renewed Motion to Dismiss for hearing in mid-March, but the hearing was continued to April 12, 1989, because plaintiffs' counsel was in trial on the date initially

set.

On April 12, 1989, the district court denied NIH's renewed Motion to Dismiss. Thereafter, NIH filed a notice of appeal and later an *ex parte* motion for stay pending appeal. Plaintiffs opposed the stay, partly on the ground that NIH had no right to appeal from the court's interlocutory order. Apparently realizing the impropriety of its appeal, the NIH then filed, the day before the May 3, 1989 hearing on the motion to stay, a bizarre and unprecedented "Motion for an Indicative Ruling." By this motion the NIH attempted to legitimize its "appeal" by having the district court declare that it would not dissolve the Temporary Restraining Order that had been in effect since December 29, 1989, beyond the time provided by Rule 65(b) of the Federal Rules of Civil Procedure. Obviously, the NIH had realized that its appeal would only be entertained by this Court if the Temporary Restraining Order were regarded as a preliminary injunction.

This was the **first** notice the NIH gave the Court that it was withdrawing its consent to the extension of the Temporary Restraining Order, or that it objected to the delays in the proceedings that had been occasioned solely by its own procedural maneuverings. The court declared with respect to the motion for indicative ruling, "this is the first time I have heard of this in my life." However, she ruled that if the 5th Circuit remanded the case, "the matter would be set down for a preliminary [injunction] hearing." (Tr., May 3, 1989, p.21) Responding to the NIH's argument that the Temporary Restraining Order had been converted into a preliminary injunction by virtue of its duration, the court recalled that "the government reluctantly acquiesced in an extension," (*Id.* at 28), and further stated that even if it were viewed as a preliminary injunction she considered that the equities weighed in favor of its issuance because

"once they [the monkeys] are dead, they are dead, you can't bring them back to life," (*Id.* at 22).

The principal question at this May 3rd hearing, however, and one that has received no mention in the NIH's brief, was whether or not federal jurisdiction had been established. Interrupting the NIH's argument that plaintiffs had not proven jurisdiction, the court stated:

> . . .I am not sure that I have jurisdiction either. The problem that has been advanced to me consistently is the failure of the plaintiffs to be permitted to discover. We don't know why the government is in this suit, quite frankly. The government intervened,[7] but there are serious questions as to whether they even should have custody of these monkeys.
>
> * * *
>
> I have denied the plaintiffs' motion to remand because nobody has advanced a reason to this Court whether their custody has not expired by some operating agreements or whatever agreements. I just felt that this Court was put in a position to attempt to rule on these motions when nobody had advanced anything to the Court.

(*Id.* at 5-6)

[7] As counsel pointed out subsequently, the NIH had not formally intervened but had been named as a defendant. However, at an earlier hearing, plaintiffs' counsel had proposed dropping NIH as a defendant, to which the NIH responded that it would simply intervene. The court's reference was undoubtedly to that discussion.

Counsel for the NIH asserted, "the NIH does have an interest in this case, obviously, Your Honor, and that's to fulfill its mission which is to conduct research on these monkeys." (*Id.* at 15). The Court properly responded to this unsubstantiated claim as follows:

> **You know, you say that, but no one has shown me one document that permits that.** I mean, you know, it's sort of like working in a vacuum. The government has not given me one document. **The only documents we have ever seen have shown that the Government's interest has long expired.** Now maybe there were some subsequent documents, I have never seen those. The government has refused — I shouldn't say refused, but they certainly have not done anything to show me that they have an interest in this case, and from what I can understand from Ms. Woodward, she has been attempting to get that information for a long time, even in other previous times, and has been unable to do so, so we have received nothing where this Court can definitely say that, sure, this document shows that the government does have an interest. We don't have anything. It has never been produced, never, to this Court.

(*Id.* at 15-16; emphasis supplied).

Counsel for the NIH answered weakly, " I am not prepared to address the existence or non-existence of any document." (*Id.* at 17). He continued with a valiant bootstrapping heave: "We're under a temporary restraining order. . . that certainly seems to give us an interest, Judge, of some kind." (*Id.*).

The court then ruled, and several times reiterated its ruling, that discovery must be permitted to go forward on the jurisdictional issue, the "very issue" before the Fifth

Circuit and in case of remand, the "next issue before this Court." (*Id.* at 20, 25, 26, 27-28). Incredibly, the NIH, in spite of the pointedly direct comments and ruling of the Court, **has still refused to cooperate in discovery.** It answered plaintiffs' interrogatories and requests for production in only two ways: 1) by referring to its self-serving affidavits previously filed in connection with the Motions to Dismiss and previously found inadequate by the district court; and 2) by objecting to all other interrogatories and requests. Included in the latter category were interrogatories directed at discovering any documents pertaining to the NIH's interest in the monkeys and records of who had made the decisions and funded expenses associated with the monkeys. A motion to compel discovery and for sanctions has been set for hearing on August 16, 1989.

III. Argument

A. *No Appealable Order Has Been Entered*

The NIH acknowledges, as it must, that an appeal will not lie from the denial of a Motion to Dismiss or the granting of a temporary restraining order. It contends, however, that the Temporary Restraining Order has been coverted into a preliminary injunction by time and by the court's statements in response to the "motion for indicative ruling." But the NIH's vigorous attempts at alchemy cannot transform this leaden "appeal" into gold.

First, as noted above, the NIH consented to the extension of the Temporary Restraining Order pending the Court's hearings on its Motion to Dismiss. By avoiding a preliminary injunction hearing, the NIH avoided all discovery, including discovery of its rightful place as a

party in the litigation. The NIH obviously hoped, and still hopes, that it could prevail on procedural grounds without ever confronting any of the myriad factual and legal issues adverse to it. It was only after the NIH had 'ap pealed" from the interlocutory denial of its motion to dismiss that it began to rethink its position and recast the nature of the Temporary Restraining Order.

The moment of the NIH's awakening is apparent. After it had "appealed", the NIH, consistent with its prior position that plaintiffs should have no discovery, moved *ex parte* for a stay pending the appeal. Plaintiffs opposed the stay, principally on the ground that the NIH had no right of appeal. On the evening before the hearing on the motion to stay, the NIH filed its peculiar "motion for an indicative ruling" by which it attempted, after-the-fact, to withdraw its prior consent to the extension of the Temporary Restraining Order, to transform the Temporary Restraining Order into a preliminary injunction, and thus to validate its appeal. That the NIH had not realized its procedural error to this point is apparent from the fact that **the NIH had not appealed from the issuance of an injunction or the undue extension of a Temporary Restraining Order but " from the order entered on April 12, 1989"** [denying the motion to dismiss and making no mention of the Temporary Restraining Order]. (See, NIH Notice of Appeal, April 17, 1989).

In an effort to give this transparent bootstrapping operation more lift, the NIH then filed a **second** notice of appeal from the denial of its motion for indicative ruling. However, at this point there was nothing to appeal **from**, because the NIH had divested the district court of jurisdiction by filing its first, improper notice of appeal. See, footnote 1 of NIH's brief, p.3; *Taylor v. Sterrett*, 640 F.2d 663, 667 (5th Cir. Unit A 1981); *Henry v. Independent American*

Savings Association, 857 F.2d 995, 997 (5th Cir. 1988); 16 Wright et al., *Federal Practice and Procedure* Sec. 3949 at 358-59 (1977).

Equally important, the Temporary Restraining Order was not transformed into a preliminary injunction at this peculiar juncture in the proceedings. Although the trial court stated that she would not dissolve the Temporary Restraining Order "or if you want to call it an injunction or whatever" because of the equities in the case, (Tr. May 3, 1989 hearing, p. 25), she clearly ruled that she would set the case for a preliminary injunction hearing upon remand by this Court, (*Id.* at 21). Thus, this is not a case in which the district court has attempted "to shield its orders from appellate review merely by designationg them as temporary restraining orders rather than as preliminary injunctions," NIH brief at p.2, quoting *Sampson v. Murray*, 415 U.S. 61, 86-87 (1974). Rather, on the first notice that the NIH was withdrawing its consent and wanted a preliminary injunction hearing, the court stated that it would fix one when it regained jurisdiction.

Under these circumstances, there is no reason to regard the Temporary Restraining Order as a preliminary injunction or to consider an "appeal" from an interlocutory order made on a record that is "replete with factual issues" including "where the governmental interest [on which federal jurisdiction has been premised] lies in this case." (District Court's comments, hearing 4/12/89, p.3)

B. ***Federal Jurisdiction Has Not Been Established***

As noted above, the district court has rightfully expressed serious reservations about the existence of federal jurisdiction over this action, which is grounded in state law. The case was filed in the Civil District Court for the

Parish of Orleans and removed to federal district court by the NIH on the ground that a federal agency, the NIH, had been named as a defendant. Plaintiffs moved to remand on the ground that removal was permitted only in actions against federal officers not agencies, see memorandum in Support of Motion to Remand, and also questioned the NIH's legal interest in the case, see plaintiffs' supplemental memorandum in support of remand. Plaintiffs' proposal to drop the NIH as a defendant was met by the NIH's statement that it would simply intervene, and the district court has repeatedly called for discovery on the basis of NIH's asserted interest. The NIH, however, has produced only a plainly expired order and its own unsubstantiated declarations of interest. In the face of its prior assertions that IBR was the owner of the Silver Spring Monkeys and that the NIH had no authority to determine their fates, the NIH's present position is highly suspect.

Moreover, the NIH has refused to respond to discovery **ordered** by the district court to resolve the factual dispute. Absent such discovery, which is the subject of a motion to compel pending in the district court, this Court is in no better position than was the trial court to determine the jurisdictional question.

The NIH, in pressing an invalid appeal on multiple procedural issues, has placed the cart before the horse. Federal jurisdiction is the threshold question, and it must be answered affirmatively **before** the NIH's questions can be addressed. Unless this Court has jurisdiction, it cannot reach the issues raised by the NIH. On the present record, however, the jurisdictional question cannot be answered. The NIH, which has refused to confront the matter of jurisdiction, is in effect asking this Court to support its recalcitrance and **assume** jurisdiction so that it can proceed to adjudicate claims that are not properly before the Court.

Nothing could be more offensive to the "presumption . . . that every federal court is 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986), reh. den. 796 F.2d 86. This presumption flows inescapably from the principle "of first importance" that federal courts are courts of limited jurisdiction by origin and design. *Id.*, and Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Sec. 3522. Thus, as Wright, Miller and Cooper have stated at pages 61-62: "because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court."

Contrary to these established principles "the government's position," as stated by its counsel at the May 3rd hearing, "is that it's up to the Plaintiffs to show at the outset that there's jurisdiction, and that it's improper. . . for the Plaintiffs to come into Court and say, 'we need discovery in order to establish jurisdiction.'" (Tr. at p.6). The NIH's attempted re-allocation of the burden of proof runs counter to the Supreme Court's holdings that the burden is on the party claiming jurisdiction to demonstrate that the court has jurisdiction over the subject matter. *Thompson v. Gaskill*, 315 U.S. 442, 625 Ct. 673 (1942); *Gibbs v. Buck*, 307 U.S. 66, 72, 59 S.Ct. 725, 729 (1939).

As the district court properly noted, plaintiffs filed suit in state court and the NIH removed, and plaintiffs have consistently challenged the removal and the court's jurisdiction, placing the burden of proving jurisdiction squarely on the NIH's shoulders. Worse than the NIH's

failure to carry its burden of establishing jurisdiction is its opposition to plaintiffs' discovery into its alleged jurisdictional basis. On the one hand NIH asserts, wrongly, that plaintiffs must prove the existence of jurisdiction that plaintiffs deny; on the other, NIH argues that plaintiffs are not entitled to discovery on the issue. When the district court clearly, properly, and firmly ordered discovery to proceed on this issue, the NIH simply refused to produce any new information.

The jurisdictional problem presented is no less acute for this Court than it was for the district court. The Supreme Court has said: "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a case under review." *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165 (1934).

Because jurisdiction does not appear affirmatively from the record, the instant appeal should be dismissed.

IV. *Conclusion*

It should be apparent from the preceding discussion that the NIH has been toying not only with plaintiffs but with the courts in this matter.

The NIH has removed a state court action to federal court, asserting subject matter jurisdiction that plaintiffs have consistently challenged. Instead of addressing the threshold jurisdictional question, NIH proceeded along its own agenda of repeated motions to dismiss. When those failed, the NIH lodged an improper appeal. It then sought to block further discovery by an improper *ex parte* motion for stay. When the legitimacy of the appeal and the stay was properly assailed, NIH brought an unheard-of motion in a court it had stripped of jurisdiction. When the motion

failed, NIH pointed to its own self-serving and *ex post facto* filing as an expression of **prior** opposition to the Temporary Restraining Order. When plaintiffs moved to dismiss the appeal, the NIH failed to respond timely, and instead, without any notice to plaintiff, sought the Court's approval for the incorporation of its opposition in its brief on the merits. NIH apparently considered that its misrepresentative statement of the issue in the case of "plaintiffs vs. world health" would deflect attention from the jurisdictional problem. Meanwhile, the NIH has flouted the district court's order concerning jurisdictional discovery, subverting plaintiffs' right and ability to contest jurisdiction.

The federal government, in the person of the NIH, has lost sight of its representative nature in this litigation and has turned its might and resources on the unfair and oppressive obstruction of plaintiffs' rights to question its positions through judicial process. The appeal should be dismissed and the case remanded for resolution of the jurisdictional issue.

Respectfully Submitted,

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NOTE: CERTIFICATE OMITTED

(6)

NO. 90-89

Supreme Court, U.S.
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JAN 9 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS

Petitioners

V.

ADMINISTRATORS OF TULANE-EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON THE MERITS ON BEHALF OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

1. Whether the Fifth Circuit properly ruled that a federal agency may remove to federal court a nonfederal action brought against it in state court. 28 U.S.C. Sec. 1442 provides that an action against an officer is removable, and there are conflicting decisions on whether an action against a federal agency, as opposed to one against a federal official, may be removed under this provision.

LIST OF PARTIES

1. International Primate Protection League and Its Members - Petitioners

2. People for the Ethical Treatment of Animals and Its Members - Petitioners

3. Alex Pacheco - Petitioner

4. Louisiana in Support of Animals and Its Members - Petitioners

5. Administrators of Tulane Educational Fund - Respondent

6. National Institutes of Health - Respondent

7. Institutes for Behavior Resources, Inc. - Respondent

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CITATION TO OPINION OF FIFTH CIRCUIT

The opinion of the United States Court of Appeals for the Fifth Circuit in *International Primate Protection League v. Administrators of Tulane Educational Fund, et al*, rendered on March 8, 1990, is reported at 895 F.2d 1056, and is set forth in the Appendix at A-1 through 16.[1]

JURISDICTION

This Court's Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1). The judgment of the Court of Appeals was entered on March 8, 1990. A petition for rehearing was denied by that court on April 13, 1990. A petition for a Writ of Certiorari was filed on July 12, 1990. Certiorari was granted on November 26, 1990.

STATUTE INVOLVED

28 U.S.C. Sec. 1442(a)(1) provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them...
>
> (1) any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

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[1] Citations to the "Appendix" or "A-1" refer to the Appendix to the Petition for Writ of Certiorari; the Joint Appendix is referred to as "Jt. App."

STATEMENT OF THE CASE

This case arises out of the spirited public debate concerning the "Silver Spring Monkeys." These 31 primates were formerly used in experiments conducted by a private research facility, the Institute for Behavioral Research ("IBR"), under a grant from the National Institutes of Health ("NIH"). In 1981, Maryland police raided the IBR laboratory and seized the surviving 17 monkeys. Most of the animals seized had crippled arms as the result of the experiment, and had deformed or missing fingers due to self-mutilation and inadequate veterinary care. The state of Maryland arrested and charged IBR principal investigator, Edward Taub, with violation of the state statute prohibiting cruelty to animals. The monkeys were initially placed in the custody of several of the plaintiffs, and were then delivered by plaintiffs to the NIH pursuant to a court order vesting temporary custody of the animals in NIH pending Taub's prosecution.[1] NIH terminated the experiment due to violations by Taub of the NIH Guide to the Care and Use of Laboratory Animals. Taub's laboratory was permanently closed, and all that remained was the disposition of the crippled animals.

From the time that the police seized the monkeys in 1981, plaintiffs have sought to ensure that the animals would not be further abused or needlessly killed. Several animal protection groups brought suit under the federal

[1] Taub, a psychologist, was convicted of multiple counts of animal cruelty. His conviction was later set aside because the Court of Appeals of Maryland held that the state anticruelty statute did not, as a matter of legislative intent, apply to animals used in scientific research. *See Taub v. State*, 296 Md. 439, 463 A.2d 819 (1983). Several months after the decision was handed down, the Maryland legislature amended the anticruelty statute to include animals used in experiments, irrespective of the source of funding, within the scope of the statute.

Animal Welfare Act, 7 U.S.C. sections 2131-2157 (1988), to protect the primates' interests, but the groups were found not to have standing to enforce the statute. *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), *cert denied*, 481 U.S. 1004, 107 S.Ct. 1624 (1987). In addition, various animal protection groups offered to NIH to purchase the animals, and to care for them at no expense to the government.

In 1986, NIH and IBR stated in writing that the primates were of no further scientific use, and that they had no plans to use the monkeys for any purpose now or in the future. More than 300 members of Congress petitioned NIH to release the animals to a sanctuary where the animals would be resocialized and given proper veterinary care for the remainder of their lives, and at no expense to the taxpayers.

NIH acknowledged the congressional concern, and promised Congress, in writing, that the animals: (1) would not be subjected to any further experiments; (2) that they would be receive needed veterinary care,[2] (3) that they would be resocialized; and (4) that they would be allowed to live out the remainder of their natural lives. Further, NIH stated to Congress that the monkeys would not be transferred from NIH to any other location without advance notice to key members of Congress who had indicated interest in the matter. Shortly thereafter, and without any notice of any kind, NIH transferred the monkeys from an NIH facility to the Delta Regional Primate Research Center ("Delta"), a branch of Tulane University, in Louisiana.

[2] As a result of Taub's experiments, several of the monkeys had crippled limbs that needed to be amputated. NIH promised that the crippled limbs would be amputated.

This move, and the subsequent experimentation to which the remaining primates have been expo ed, violates all of the promises that NIH made to Congress concerning the Silver Spring Monkeys. More than 100 Members of Congress have since co-sponsored federal legislation to compel NIH to transfer the surviving animals to a sanctuary. The controversy about the primates continues as animal protection groups, together with members of Congress, proceed to press for the release of the animals to an animal sanctuary, and criticize NIH for its blatant disregard of its promises concerning these animals.

After the primates were transferred to Delta, columnist Jack Anderson reported that the NIH planned to arrange in a clandestine manner a transfer of title to the animals to Tulane, and that Delta planned to kill the animals in order to moot the public controversy and to spare NIH any political embarrassment and responsibility for their death. Congressional uproar followed Anderson's report and five of the primates were transferred to the San Diego zoo. This litigation involves the four surviving monkeys.[3]

The present case was initially filed on December 28, 1988, shortly after petitioners learned that NIH, which had earlier stated in writing that the monkeys were of no remaining scientific value, and had promised Congress that the animals would be subjected to no further experiments and would be allowed to live out the remainder of their natural lives, planned to perform a lethal experiment on three of the remaining animals on December 29, 1988. Petitioners instituted the suit in state court, naming as defend-

[3] When this litigation began, there were nine remaining animals. Five have died during the pendency of the suit. Three were subjected to lethal experiments on July 6, 1990, after courts denied petitions for emergency injunctive relief. *See infra* note 4.

ants NIH, IBR, and the Administrators of the Tulane Educational Fund ("Tulane"), the custodian of the animals. The suit alleged that there was no legitimate research interest to be pursued and that the primates were being killed for political reasons,[4] that the plaintiff animal protection groups and their members would be aggrieved irreparably by the destruction of the primates, and that the destruction of the animals constituted a public nuisance, an intentional infliction of emotional distress, and a violation of public policy, all under Louisiana law. Plaintiffs sought injunctive relief to prevent the killing of the animals, and sought to transfer custody to the plaintiffs or to members of Congress who had offered to purchase the animals and to facilitate a transfer of these animals to an appropriate animal sanctuary. (*See* Petition, A-30ff)

The state court immediately issued a temporary restraining order that prevented the killing of the animals. NIH then sought to remove the case to federal court, relying upon 28 U.S.C. section 1442(a)(1). A second temporary restraining order was issued by the federal court. (A-16) Plaintiffs moved to remand the case to state court, and the federal court denied this motion. (A-17) Defendants made successive motions to dismiss the suit on grounds of res judicata, sovereign immunity, federal preemption, and lack of standing, and the federal court also denied these motions. (A-17, A-18) Defendants appealed from the denial of their second motion to dismiss, and the United States Court of Appeals for the Fifth Circuit, holding that plain-

[4] An action has been filed in the District Court for the District of Columbia charging NIH with scientific misconduct and fraud in connection with the experiments conducted on, or planned to be conducted on, the remaining animals. The court recently declined to issue a restraining order prohibiting the destruction of three of the monkeys. *Physicians Committee for Responsible Medicine v. Sullivan*, case number 90-0084 (D.D.C.).

tiffs lacked standing, ordered the case dismissed.[5]

SUMMARY OF THE ARGUMENT

The Fifth Circuit improperly ruled that a federal agency may remove to a federal court an action brought solely on *state*-law grounds in a *state* court. The statute relied upon by NIH and the Fifth Circuit, 28 U.S.C. section 1442(a), provides that any action against *an officer* of a federal agency is removable, and not that a suit brought against *an agency* may be removed. Although there is a conflict in the lower federal courts concerning the interpretation of 28 U.S.C. section 1442(a) as it involves this question, and a minority of courts permit removal by federal agencies, petitioners respectfully maintain that the clear weight of the law and of logic supports those courts that have interpreted 28 U.S.C. section 1442(a) as *not* permitting removal under these circumstances.

If the Fifth Circuit approach is accepted, then state courts will be divested of jurisdiction whenever a case involves a "federal interest." The Fifth Circuit's action was particularly problematic in the present case as there was no evidence before the court that the federal agency that sought removal-the NIH-had an interest in the case that justified the exercise of federal jurisdiction over state claims in the first instance.

The predecessor of 28 U.S.C. section 1442(a) was enacted specifically to protect *federal customs officers* in

[5] When defendants appealed from the denial of their motion to dismiss, plaintiffs pointed out that the order was not appealable. Before the Fifth Circuit, defendants argued that they were appealing from the grant of the temporary restraining order, which, according to defendants, was tantamount to the granting of a preliminary injunction because of the duration of the TRO. *See infra* section E of the Argument herein.

the enforcement of an unpopular statute by providing a federal forum for defenses existing under federal law. Later expansions of the law, including the current section 1442(a), explicitly authorize removal of actions against federal *officers* only. Both the legislative history of the statute and the express language of section 1442(a) clearly indicate congressional intent to limit the right of removal under this provision to natural persons, and not to entire federal regulatory agencies.

Courts that have decided to the contrary are acting in explicit disregard of the legislative history, and express language of section 1442(a). Indeed, in some cases, courts have read the statute so broadly as to expand removal jurisdiction beyond the scope of the original jurisdiction of the federal courts. The majority rule, which would prohibit removal in these circumstances, accords with the explicit language of the statute, congressional intent, and common sense.

ARGUMENT

On December 28, 1988, plaintiffs filed their petition, which contained various *state*-law claims against Tulane, IBR, and NIH, in a *state* court in Louisiana. On that same date, the state court enjoined Tulane, the only party that had been served at the time, from the killing or other inhumane treatment of the remaining Silver Spring monkeys. Two days later, NIH removed the case to the federal court for the Eastern District of Louisiana. NIH predicated removal on 28 U.S.C. section 1442(a), asserting that NIH "is an agency of the United States of America, and the Federal District Courts have original jurisdiction over all actions commenced against such federal agencies."

Petitioners promptly moved for a remand to the

state court, contending that section 1442(a) authorized removal only of actions brought against *natural persons* who are federal *officers*. Petitioners recognized that the Fifth Circuit and a minority of jurisdictions construed the statute more liberally to permit removal of an action against a federal *agency* as well, but petitioners argued that the legislative history, purpose, and explicit statutory language demonstrated unequivocally that removal is limited only to actions involving *natural* persons who are federal *officers*. The district court upheld the removal based upon Fifth Circuit precedent, and the Fifth Circuit affirmed the decision with virtually no consideration of the countervailing argument based on the statutory language and history of section 1442(a), which has been accepted by the majority of jurisdictions to interpret section 1442(a).

A. The Plain Language of Section 1442(a) Authorizes Removal by Federal Officers, Not Agencies

As this Court has observed often: "The starting point for interpretation of a statute is the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum and Chemical Corporation v. Bonjorno*, __U.S.__, 110 S.Ct. 1570, 1575 (1990)(quoting *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In this case, the statutory language conclusively establishes that removal is appropriate only for federal *officers* and not agencies.

Section 1442(a) is titled as "Federal Officers Sued or Prosecuted." In keeping with this title, section 1442(a) provides, in pertinent part:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following *persons* may be removed by *them*. . .
>
> (1) any officer of the United States or any agency thereof, or *person* acting *under* him, for any act under color of such office or on account of such right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or collection of the revenue.

28 U.S.C. section 1442(a)(emphasis added).

By its own terms, the statute applies to suits against *natural persons* and not against agencies of the federal government. In subsection (a), the statute states that an action against any of the following listed *persons* may be removed by *them*. Further, in paragraph (1) under subsection (a), the listed person is *any officer* of the United States or of an agency thereof. The person may be an officer of the United States *or* an officer of an agency of the United States.

There can be no serious argument that the expression, "any agency thereof," contained in paragraph (1), was intended to confer the right of removal on agencies of the federal government. If Congress had wished to include federal agencies within the ambit of section 1442(a), Congress could have simply phrased paragraph (1) to read: "any officer of the United States, any agency thereof, ..." That is, Congress needed only to indicate that the removal right extended to *agencies* as well, and not just to natural persons. In this way, Congress could have conferred the removal right on agencies and not just officers. But Congress did not write such a statute; on the contrary, the language, syntax, and punctuation explicitly limited the scope of the statute to natural *persons* who are federal *officers*. Congress was fully aware of the distinction between "persons" and "agencies." For example, the

Administrative Procedure Act clearly defines "agency" as a concept that is separate and apart from "person," and, indeed, the definition of "person" explicitly *excludes* agencies. *See*, 5 U.S.C. section 551(1), 551(2)("person includes an individual, partnership, corporation, association or public or private organization *other than an agency*"(emphasis added)).

As further proof that Congress limited the scope of section 1442(a) to apply only to persons and not agencies, Congress chose to extend the right of removal to any "person acting under *him.*" If the right of removal extended to agencies as well as officers, the use of the word "him" would have been clearly incorrect. Instead, Congress would have had to use an expression like "or person acting under him *or for the agency.*" But Congress did not choose to write a different statute; rather, it wrote section 1442(a) as it stands, and explicitly chose to extend the right of removal to natural *persons* who are federal *officers* or to those *persons* working under *him*. As the Third Circuit observed: "We cannot read a statute to say what it does not say, and we think it plain from the punctuation of the sentence, and the use and placement of the word "him" that this statute merely allows removal by any officer . . . or person acting under him." *Lovell Manufacturing v. Export-Import Bank*, 843 F.2d 725, 733 (3d Cir. 1988).

B. The Legislative History of Section 1442(a) Supports a Literal Reading of its Terms

As this Court observed in *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813 (1969), the original federal officer removal statute was intended to protect federal customs officers who were enforcing a trade embargo with England over the opposition of the states in New England: "Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts." 395 U.S. at 405; 89 S.Ct. at 1815. There is *absolutely nothing* in the history of section 1442(a) that would indicate that Congress intended to insulate federal regulatory agencies from the jurisdiction of state courts.

The predecessor of paragraph (1) of section 1442(a) was limited to *revenue* officers engaged in the enforcement of the criminal or revenue laws, and those acting under or by their authority. 1A *Moore's Federal Practice*, section 0.164[1] at 380-81. Although the present law broadens coverage to include federal officers other than those involved in the enforcement of the revenue laws, the coverage was broadened to include *additional federal employees*, and not to include non-natural persons or entities. *Cf. Michigan v. Banning*, 88 F.Supp. 449, 450 (E.D.Mich. 1950). According to Professor Moore:

> "[I]n extending the application of [Sec. 1442(a) paragraph (1) to federal officials and employees generally, the revision [of the Judicial Code of 1948] made no change in the theory or basis for removal that the civil suit or criminal prosecution must be against the officer or employee, and based upon an act or acts done under color of office, etc."

Id. at 382-84 (footnotes omitted). Thus, Professor Moore correctly concluded that "a suit against a government corporation, as distinguished from a suit against a federal official or one acting under him, is not removable under Sec. 1442(a)(1)." *Id.* It is clear that "[n]othing in the legislative history [of section 1442(a)(1)] reveals that the term "officer" was intended to include corporations or agencies as distinguished from individuals." *Lance International, Inc. v. Aetna Casualty and Surety Company*, 264 F.Supp. 349, 355 (S.D.N.Y. 1967).

C. *The Conflict Among the Jurisdictions Should be Resolved in Favor of the Plain Language of Section 1442(a), and its Legislative History*

There is a conflict among courts as to whether section 1442(a)(1) permits removal in the case of federal agencies. The majority of courts that have confronted the issue have held that "it is clear to us that a fair reading of the statute only allows officers, and not agencies, to remove cases to federal courts." *Lovell Manufacturing v. Export-Import Bank*, 843 F.2d 725, 733 (3d. Cir. 1988). *See also C.H. c. American Red Cross*, 684 F.Supp. 1018 (E.D.Mo.1987); *W-V Enterprises, Inc. v. North Kansas Savings Association*, 628 F.Supp. 1261 (D. Kan 1986); *Woodward v. Turnage*, 646 F.Supp. 219, 221 (E.D.Mo. 1986); Gensplit FInance Corporation v. Foreign Credit Insurance Association, 616 F.Supp. 1504, 1509 (E.D.Wis. 1985); *City of Alma v. Bell, Galyardt & Wells, Inc.*, 606 F.Supp. 686, 689-90 (D.Neb. 1985); *Lowe v. Norfolk & Western Railroad Company*, 529 S.Supp. 491 (D.Ill. 1982); *Brewer v. Department of Housing and Urban Development*, 508 F.Supp. 72, 74 (S.D.Ohio 1980); *KCPO Employees Credit Union v. Mitchells*, 421 F.Supp. 1327 (W.D.Mo. 1976); *California v. Bozarth*, 356 F.Supp. 667 (N.D.Cal. 1973); *Lance International, Inc. v. Aetna Casualty and Surety Company*, 264 F.Supp. 349 (S.D.N.Y. 1967); *Harlem River Produce Company v. Aetna Casualty and Surety Company*, 257 F.Supp. 160 (S.D.N.Y. 1960).

A minority of courts, however, including the Fifth Circuit in the present case, have held that section 1442(a)(1) permits federal *agencies* to remove to federal courts. These cases may be broken down into two categories.

First, there are cases in which a federal agency or private corporation did remove to federal court under section 1442(a), but where the issue of the scope of section 1442(a) was simply not raised. *See, e.g., Camacho v. Autoridad de Telephonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989); *Johnson v. Showers*, 747 F.2d 1229 (8th Cir. 1084); *Monal Construction Company*, 539 F.Supp. 478 (W.D.Pa. 1982). In *Camacho*, plaintiffs brought suit in state court against two quasi-public telephone companies, alleging that they improperly intercepted plaintiffs' telephone calls. The telephone companies removed the action to federal court, and the "[p]laintiffs neither contested removal nor sought remand." 868 F.2d at 484. On appeal, plaintiffs did contest removal on the ground that the phone companies were not acting under the direction of government officials. The First Circuit rejected this claim, holding that plaintiffs had not contested the telephone companies' averment in their removal petition to the effect that at all times, the companies were acting under the orders and control of federal agents. The issue in *Camacho* was not whether section 1442(a) provided for removal only by natural persons, but rather, was whether, under the circumstances, section 1442(a) provided removal protection "to *private* persons, like appellees, who act under the direction of federal officers." *Id.* at 487. The court assumed, and the parties did not argue otherwise, that the appellees in *Camacho* were *persons* under section 1442(a).

Similarly, in *Johnson v. Showers*, the government made an unopposed request that a suit brought against an agency "should be deemed as one brought against" the agency's director, which the court simply accepted for purposes of section 1442(a). Again, the issue of the scope of section 1442(a) was neither raised by the parties nor discussed by the court. In *Monal Construction Company*, the court simply assumed that the Department of Housing and Urban Development could remove to federal court under section 1442(a) but the issue was neither raised nor

discussed.

Second, there are several cases in which the scope of section 1442(a) is discussed in terms of the person/agency question relevant to the instant case, and in whch the courts conclude that removal protection is not limited to natural persons who are federal officers or persons working at their direction. In *National Audubon Society v. Department of Water & Power*, 496 F.Supp. 499, 508 (E.D.Cal. 1980), the agency argued, and the court accepted, that the agency should be considered as "a person acting under [the federal officer]." In *Township of Middletown v. N/E Regional Office*, 601 F.Supp. 125, 127 (D.N.J. 1985), the court stated that the statutory language "could permissibly be interpreted to allow or disallow removal by a federal agency," and then simply proceeded to allow removal based on a view that the broader interpretation of section 1442(a) was required to protect federal authority.

Courts that give a broader interpretation to section 1442(a) tend generally to cite as authority C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure*, section 3727, at 457; "It is not clear whether federal agencies themselves may remove under Section 1442 [but a] broad interpretation of the statute is clearly justified in terms of the intent of Congress to protect the valid exercise of federal authority." *See National Audubon Society*, 496 F.Supp. at 508; *Township of Middletown*, 496 F.Supp. at 127. The authority cited for this proposition in the Wright/Miller/Cooper treatise is this Court's decision in *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813 (1969). Nothing in *Willingham*, however, supports such a liberal interpretation of section 1442(a) that would extend removal protection beyond natural persons who are federal officers or those persons working under them. Indeed, the issue was never even presented to this Court in that case.

In *Willingham*, this Court was called upon to interpret the meaning of section 1442(a) in providing that an *officer* may remove an action commenced *against him* "for any act under color of such office. . . ." Two federal officers, the warden and chief medical officer at the United States Penitentiary in Leavenworth, Kansas, had been sued individually and personally by a prisoner for physical abuse allegedly imposed by the officers "on a frolic of their own with no relevancy to their official duties." 395 U.S. at 407, 89 S.Ct. at 1816. Thus, *Willingham* had nothing to do with a challenge against a federal agency. The officers removed the case to federal court and the district court judge, after denying a motion to remand, entered summary judgment in favor of the officers under the then-operative official immunity doctrine. On appeal, the Tenth Circuit reversed, holding that the "color of office" test of section 1442(a)(1) was "much narrower" than the test for official immunity.

This Court disagreed, holding that the test for removal should be broader, and not narrower, than the test for official immunity because the purpose of the removal statute was to provide a federal forum for cases in which federal officials must raise defenses arising from their official duties. In this connection, *and not in connection with any examination as to whether section 1442(a)(1) extended to provide removal protection to federal agencies*, this Court stated that "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of Sec. 1442(a)1)." 395 U.S. at 407, 89 S.Ct. at 1816. This Court properly construed the "color of office" test and found that because the officers' relationship to the prisoner derived solely from their official duties, the alleged acts at issue were "under color of. . .office" and the removal was, therefore, proper.

Willingham did not address the issue presented to

the Court in this case. Even Wright, Miller, and Cooper acknowledge that to the extent they rely on *Willingham* as support for an interpretation of section 1442(a)(1) that would cover federal agencies, the language in *Willingham* was *dicta*. *See* C. Wright, A. Miller, & E. Cooper, *supra*, at section 3727 at p. 457, n. 30. In urging a construction of section 1442(a)(1) broad enough "to cover all cases where *federal officers* can raise a colorable defense arising out of their duty to enforce federal law," *Willingham* simply did not give lower courts the license to read into the statute what it plainly does not say. 395 U.S. at 406-07, 89 S.Ct. at 1816. Indeed, reliance on *Willingham* at all is seriously misplaced in the light of this Court's explicit recognition in that case that section 1442(a)(1) was derived from an earlier statute that was expressly intended to protect *federal revenue officers*. *See*, 395 U.S. at 405-06, 89 S.Ct. at 1815-16.

Moreover, a liberal interpretation of section 1442(a)(1) that would allow removal whenever a federal agency is involved threatens to broaden removal jurisdiction far beyond original jurisdiction. For example, although the court in *Camacho*, *supra*, did not specifically address the question whether section 1442(a)(1) applied to federal agencies, the court stated that section 1442(a)(1) represents "a legislatively-spawned value judgment that a federal forum should be available when particular litigation implicates a *cognizable federal interest*." 868 F.2d at 487 (emphasis added). Because federal district courts do not have original jurisdiction whenever the United States is a party, or a "cognizable federal interest" is present, such an expansive interpretation of section 1442(a)(1) would create a removal jurisdiction that would be wider in scope than the original jurisdiction of the federal courts. Indeed, in *National Audubon Society*, the court was presented with this very argument, and, unlike *Camacho*, the argument

was presented in the precise context of determining whether section 1442(a)(1) conferred removal rights on federal agencies. The court in *National Audubon Society* stated that "[i]t has been suggested. . .that a reading of the statute as broadly as the court has suggested herein would authorize removal whenever the United States is a litigant. . . .The answer to that is short. *Removal jurisdiction may indeed be broader than original jurisdiction.*" 496 F.Supp. at 508-09 (emphasis added). This anomalous result is yet another reason to reject the expansive interpretation of section 1442(a)(1) accepted by the court below.

The majority view clearly does require remand of actions removed by federal agencies, but because remand orders are not considered final orders reviewable by appeal, *see* 28 U.S.C. section 1291; *Thermton Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53, 96 S.Ct. 584, 593-94 (1976), it is not surprising that the majority view is expressed principally in district court decisions. *Lovell Manufacturing*, *supra*, the only circuit court decision articulating the majority view, contains a thoughtful analysis of the statute's language and legislative history. By contrast, the Fifth Circuit adopted the minority view without articulating any basis for its choice. The Fifth Circuit's ruling was erroneous, and this case should be remanded.

D. This Case Presents Issues of State Law That Are Within the Peculiar Province of the Louisiana State Courts to Resolve

In the earlier *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004, 107 S.Ct. 1624 (1987), the plaintiffs, including several plaintiffs involved

in the present suit, sued IBR, NIH, and others in *state* court, seeking custody of the monkeys under Maryland state law and seeking to enforce the federal Animal Welfare Act, 7 U.S.C. sections 2131-2157 (1988). NIH removed the case to federal court on the ground of a federal question. The Fourth Circuit held that enforcement of the federal Animal Welfare Act was entrusted to the United States Department of Agriculture and the plaintiffs had no standing to sue under that statute. After the court dispensed with the federal claims, the court declined to exercise pendant jurisdiction over the state law claims. Implicit in the court's ruling was a determination that section 1442(a)(1) does not establish federal jurisdiction over any action brought against a federal agency, as both NIH and the Department of Health and Human Services were defendants in that action.

When plaintiffs in the present action reinstituted those purely state law claims that the Fourth Circuit had referred to state court, NIH again removed to federal court. Because the monkeys had been moved to Louisiana, plaintiffs filed in a Louisiana state court, and NIH removed to a federal district court in one of the few jurisdictions in which such removal is tolerated in light of the Fifth Circuit's broad—and erroneous—interpretation of section 1442(a)(1). Although the Fourth Circuit dismissed those state law claims for want of jurisdiction, the Fifth Circuit exercised jurisdiction only long enough to dismiss plaintiffs' nonfederal claims (with prejudice) for lack of standing under Article III of the United States Constitution—a requirement peculiar to the federal courts.

The Fifth Circuit erroneously rejected petitioners' argument that the Fourth Circuit's ruling was *res judicata* as to the jurisdictional issue. Although dismissals for lack

of subject matter jurisdiction do not operate as adjudications on the merits, and thus do not preclude a second action on the same claim, such dismissals do generally preclude relitigation of the underlying issue of jurisdiction. *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986); *Dozier v. Ford Motor Company*, 702 F.2d 1189, 1194 (D.C.Cir. 1983)(per Scalia, J.); *Stewart Security Corporation v. Guaranty Trust Company*, 597 F.2d 240, 241 (10th Cir. 1979). Hence, the Fourth Circuit's judgment that the plaintiffs' state-law claims against NIH were not cognizable in federal court remained effective to preclude litigation of the precise issue of jurisdiction that led to the dismissal in the first instance.

Although petitioners had filed in a court of competent jurisdiction in light of the Fourth Circuit ruling, the Fifth Circuit accorded no preclusive effect to the Fourth Circuit's dismissal of the state-law claims. The Fourth Circuit's implied ruling was, however, the correct one. The claims asserted here, grounded in Louisiana principles of public nuisance, tort, and equity, presented issues of state law. The primates at issue in this litigation are *privately* owned and housed in a local *private* facility. As discussed *infra*, the federal agency's interest in this matter is peripheral at best, raising further questions about the propriety of federal intervention into a purely local matter.

E. The Fifth Circuit Improperly Usurped the Role of the District Court and Engaged in Ruling that NIH Had Sufficient Interest in this Action to Authorize the Exercise of Federal Jurisdiction

This Court has consistently admonished that "appellate courts must constantly have in mind their function is not to decide factual issues *de novo*." *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89

S.Ct. 1562, 1576 (1969). *See also* Fed.R.Civ.P. 52(a). In the present case, there were serious questions presented in the district court concerning NIH's interest in the monkeys. These issues remained unresolved because although the district court had ordered discovery on this precise issue, the Fifth Circuit simply decided, on a tenuous factual record, that NIH was a proper party. In so doing, the Fifth Circuit invaded the fact-finding province of the district court and upheld jurisdiction on the basis of completely unsubstantiated assertions by NIH and under highly questionable circumstances.

Although petitioners named NIH as a defendant in this suit, petitioners challenged and questioned NIH's role in the proceedings from the outset. Indeed, the *only* reason that petitioners named NIH at all was because NIH claimed responsibility for the decision to kill the Silver Spring monkeys in December 1988, immediately before the suit was instituted. When NIH removed the case to federal court, petitioners moved to remand on the ground that section 1442(a)(1) is inapplicable to a suit against a federal *agency* and on the ground that NIH had an insufficient interest in the case to justify the presence of a nonfederal suit in a federal court.

With respect to the issue concerning section 1442(a)(1), the district court felt bound to follow the Fifth Circuit's precedent. On the question of NIH's interest, however, the district court reacted with caution and concern. The trial court observed: "We don't know why the government is in this suit, quite frankly. The government intervened,[6] but there are serious questions as to whether

[6] The district court stated that NIH had formally intervened, but as counsel pointed out subsequently, NIH had been named as a defendant. At an earlier hearing, however, counsel for plaintiffs had proposed dropping NIH from the suit, and NIH stated that it would simply intervene if dropped. The court was referring to that earlier hearing.

they should have custody of these monkeys." Hearing, May 3, 1989, at 5-6. When counsel for NIH made an unsubstantiated claim that NIH did have an interest, the district court responded:

> "*You know, you say that, but no one has has shown me one document that permits that.* I mean, you know, it's sort of working in a vacuum. The government has not given me one document. *The only documents that we have ever seen show that the Government's interest has long expired.* Now maybe there were some subsequent documents, I have never seen those. The government has refused—I shouldn't say refused, but they certainly have not done anything to show me that they have an interest in this case, and from what I can understand from Ms. Woodward, she has been attempting to get that information for a long time, even in other previous times, and has been unable to do so, so we have received nothing where the Court can definitely say that, sure, this document shows that the government does have an interest. We don't have anything. It has never been produced, never to this Court."

Id. at 15-16 (emphasis added). The district court ruled, and emphasized on several occasions, that discovery must go forward on the jurisdictional issue, the "very issue" to be placed before the Fifth Circuit on appeal and in case of remand, the "next issue before this Court." *Id.* at 20, 25, 26, 27-38.

NIH refused to document its interest, and refused to respond to plaintiffs' discovery requests relating to NIH's interest in the case. Instead, NIH appealed from the denial of its motion to dismiss (A-27). When plaintiffs pointed out

that the denial of the motion to dismiss was not an appealable order, NIH filed a novel pleading styled "Motion for Indicative Ruling," in which it requested that the district court "indicate" whether it would grant a preliminary injunction if the issue were before it. At the hearing on this "Motion for Indicative Ruling," the court indicated concern as to whether it even had jurisdiction to consider the motion in light of the pending appeal. The court did, however, deny the motion, and NIH then argued that the TRO the court had issued had been converted into a preliminary injunction by the length of its duration,[7] vesting in NIH the right to appeal from the issuance of a preliminary injunction. (A-29) Plaintiffs responded that NIH was simply trying to manipulate the proceedings to secure an appeal without responding to the discovery requests that the district court had ordered.[8] The Fifth Circuit denied plaintiff's motion to dismiss the NIH appeal. (A-22)

On appeal, then, the Fifth Circuit had nothing before it that would have established NIH's interest in the case apart from NIH's own unsubstantiated assertions that the district court had already explicitly found to be inadequate. Indeed, some of NIH's assertions, such as its claim of custody of the monkeys based upon an expired court order, were proven false. All of NIH's assertions were highly suspicious, especially in light of NIH's political interest in preserving the falsehood concerning its supposed court-ordered custody, and its earlier written admission that NIH had no further scientific use for the animals.

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[7] Of course, NIH had *consented* to the extension of the TRO, but then withdrew consent.

[8] Because of the pendency of the appeal, the district court opined that it had been stripped of jurisdiction to enforce its earlier order that discovery proceed on the issue of NIH's interest in the case. *See* A-20, A-23.

Despite the lack of evidence before the Fifth Circuit concerning the interest of NIH, the Fifth Circuit found as a fact that NIH's newly found fatal brain experiments on the primates was "in furtherance of NIH's statutory mission to conduct and fund biomedical research." (A-14-15) By adverting to NIH's "Statutory mission," the Fifth Circuit thereby completely sidestepped—and improperly so—the question whether NIH has any real interest and authority in this case.[9] The issue of NIH's interest was: (1) the central issue in dispute; (2) the issue vigorously contested by plaintiffs; (3) the issue on which the district court had made no finding; (4) the issue on which the district court had ordered further discovery; and (5) the issue about which the Fifth Circuit had *no* information before it apart from NIH's own self-serving and unsubstantiated statements that the district court had rejected. Such *de novo* fact-finding by the Fifth Circuit flies in the face of this Court's repeated admonitions concerning the role of appellate courts.

The NIH had—*at best*—a highly questionable interest in this action. This questionable interest renders all the more doubtful its right to invoke the protection of section 1442(a)(1) and to remove to a federal forum a case brought under *state* court concerning *privately owned* and *privately held* animals, and that could not be maintained in a federal court because of the standing requirements of Article III of the federal Constitution.

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[9] In an earlier proceeding, NIH had resisted efforts to block its return of the Silver Spring Monkeys to IBR by stating that it lacked authority to retain IBR's property. *See* NIH Memorandum in Support of Motion to Dismiss, p. 28, in *Humane Society of the United States v. Block*, No 81-2691 (D.D.C.)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeal should be reversed, and the case remanded to the district court for purposes of remand to the state court.

Respectfully submitted,

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COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether a state court action seeking injunctive relief against both an agency of the United States [in this case the National Institutes of Health ("NIH")] and its agents and employees is subject to removal under 28 U.S.C. § 1442(a)(1) when the relief sought against such agents and employees is clearly set forth in a "Petition for Declaratory and/or Injunctive Relief," but the agents and employees are not named in the caption or body of the Petition?

LIST OF PARTIES

Respondent Institute for Behavior Resources, Inc. ("IBR") accepts petitioners' listing of the parties and notes that it is a not-for-profit District of Columbia corporation. It has no parents, subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-89

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, *et al.*,
Petitioners,

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF ON THE MERITS ON BEHALF OF RESPONDENT INSTITUTES FOR BEHAVIOR RESOURCES, INC.

OPINION BELOW

The opinion of the Court of Appeals is reported at 895 F.2d 1056. Petitioners' Appendix, A1-15, omits from the opinion of the Court of Appeals half a paragraph of text accompanying footnote 4.

STATUTE INVOLVED

28 U.S.C. § 1442(a)(1) provides:

> "(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under Act of Congress for the apprehension of punishment of criminals or the collection of revenue."

COUNTERSTATEMENT OF THE CASE

A. Background

Respondent, Institutes for Behavior Resources, Inc. ("IBR"), objects to petitioners' statement of the history of the case.[1]

In 1981, Dr. Edward Taub, the chief of the Behavioral Biology Center of the Institutes for Behavior Resources, Inc.[2] was studying the capacity of monkeys to learn to use a limb after nerves had been severed. Funded by the National Institutes of Health ("NIH"), the project amplified Dr. Taub's earlier research in this area and attempted to discover benefits for the rehabilitation of human patients suffering from a serious neurological injury such as stroke. 799 F.2d at 936.

[1] A more accurate statement of the facts can be derived from the Fourth Circuit opinion in *International Primate Protection League* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), where similar prayers for relief to those in this action were asserted by two of the petitioners; from the IBR Brief in Opposition to the Petition for a Writ of Certiorari to the Fourth Circuit; from the decision of the Supreme Court of Maryland in *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983); from the opinion below; from the Declaration and Second Declaration of Dr. Raub, IBR App. C; R. 0102-5; from the affidavit of Dr. Brady, NIH App. B; and from the affidavit of Dr. Gerone, NIH App. A. Contrary to the impression created by petitioners, the Department of Health and Human Services' Departmental Grant Appeals Board exonerated Dr. Taub as to all charges of animal cruelty or failure to provide needed veterinary care. HHS-GAB, Decision No. 538, May 31, 1984.

[2] IBR was previously named "Institute for Behavioral Research, Inc."

Petitioner Alex Pacheco, then an undergraduate student, who, unknown to Dr. Taub, had founded People for the Ethical Treatment of Animals ("PETA"), falsely claimed to be interested in a laboratory science career and offered to work as a volunteer for Taub at the IBR animal laboratory facility in Silver Spring, Maryland. Dr. Taub gave Pacheco keys to the premises, and Pacheco came regularly to the laboratory during the summer of 1981. Pacheco caused the Montgomery County Police Department to charge Dr. Taub with animal cruelty under Section 59 of the Maryland Code.

The police obtained a search warrant from the Circuit Court for Montgomery County and on September 1, 1981, seized from IBR the 17 monkeys in the experiment. Pursuant to court order they were returned to IBR. Subsequently, 17 criminal charges were filed against Dr. Taub alleging 119 violations of the Maryland animal cruelty statute.

On October 9, 1981, the Circuit Court for Montgomery County, without opposition from IBR, the owner of the monkeys, directed their transfer to an NIH facility in Poolesville, Maryland.[3] The order was to remain in effect "until further Order of this Court or the termination of the pending criminal prosecution against Dr. Taub, whichever occurs first." 799 F.2d at 936.

Dr. Taub stood trial in November 1981 in the District Court for Montgomery County, which entered orders of conviction for failure to provide "necessary veterinary care" for six monkeys and acquitted Dr. Taub of all the other 113 charges. Fearing that the court order on custody of the monkeys would expire with an acquittal, PETA sought to prevent the return of any animals to IBR. The International Primate Protection League ("Primate League"), PETA and others filed a bill of complaint on December 3, 1981 in the Circuit Court for Montgomery County in which they purported

[3] Contrary to the statement at page 2 of petitioners' Brief, petitioners did not deliver the monkeys to NIH.

to speak for "their own and class interests and as the next friends of seventeen (17) non-humans primates." Primate League alleged that a civil inquiry would demonstrate IBR violations of the Maryland animal cruelty laws and the federal Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* Primate League asked the court to designate it and the other plaintiffs as guardians of the monkeys, and to preclude IBR from regaining possession. 799 F.2d at 936.

On the basis of the federal question presented, NIH removed the case to the U.S. District Court for the District of Maryland pursuant to 28 U.S.C. § 1441(a).

Dr. Taub appealed his six District Court convictions to the Circuit Court for Montgomery County, where a jury, after a "trial de novo," returned a guilty verdict against Taub on one count (failure to provide necessary veterinary care to one monkey). The Court of Appeals of Maryland then granted a writ of certiorari and in August 1983 reversed the conviction, holding that Article 27, Section 59 of the Maryland code did not apply to an institution conducting medical research pursuant to a federal program. *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983).

After Dr. Taub was acquitted of all criminal charges, NIH continued to act as custodian of the monkeys with the consent of their owner, IBR. Second Declaration of William F. Raub, R. 0102-3.[4]

The removed Maryland suit thus became the only remaining litigation over custody of the monkeys. On the motion of IBR in 1985, the Maryland federal district

[4] Petitioner's Appendix to its Petition for a Writ of Certiorari is hereinafter cited as "Pet. App. ——." Respondent Institutes for Behavior Resources, Inc.'s Appendix to its opposition to the Petition is cited as "IBR App. ——." The NIH Appendix to its opposition to the Petition is cited as "NIH App. ——." Matters included in those appendices have not been included in the Joint Appendix ("J.A. ——") pursuant to Supreme Court Rule 26.1.

court dismissed the case for lack of standing on the part of the plaintiff.

B. The Appeal to the Fourth Circuit

In June 1986, Primate League appealed to the Fourth Circuit. While the appeal was pending, NIH transferred the remaining 15 monkeys to the Delta Regional Primate Research Center in Covington, Louisiana. IBR App. 7a-8a. Five of the monkeys, which had not been surgically altered, were later transferred to the San Diego Zoo. Pet. 4. For the care of the surgically altered animals, and one control animal, NIH entered into a contract with Tulane University through its School of Medicine ("Tulane"), which operates the Delta Center. Under the contract, the Delta Center assists NIH in its role as custodian for the monkeys. Gerone Affidavit, NIH App. 1a; Declaration of William F. Raub, IBR App. C, 8a. para. 5; Second Declaration of William F. Raub, R. 0102-5.

The Fourth Circuit affirmed the District Court, stating in part:

> "In this case we must decide whether a group of private individuals may challenge a medical researcher's compliance with federal standards for the care of laboratory animals. Because we find that the plaintiffs lack standing to bring such a lawsuit, we affirm the judgment of the district court in its dismissal of this action."
>
> "To imply a cause of action in these plaintiffs might entail serious consequences. It might open the use of animals in biomedical research to the hazards and vicissitudes of courtroom litigation. It may draw judges into the supervision and regulation of laboratory research. It might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering. To risk consequences of this magnitude in the absence of clear direction from the Congress would be ill-advised. In fact, we are persuaded that Congress intended that the independence of medical research be

respected and that administrative enforcement govern the Animal Welfare Act." 799 F.2d at 935.

Primate League then petitioned this Court for a writ of certiorari which was denied in 1987. 481 U.S. 1004 (1987).

In 1988, based on the recommendation of a panel of independent experts in veterinary care, primate behavior, and neurology, NIH determined that three of the monkeys should be euthanized because of the amount of distress they were experiencing. Plans were made to humanely euthanize them on December 28-31, 1988. Memorandum in Opposition to Motion to Compel, R. 00414 (August 11, 1989), at 3. R. 0201-2. In furtherance of its statutory research mission, NIH hoped to gain, through the procedure and subsequent autopsy of the animals, knowledge that might lead to improvements in rehabilitation therapy for individuals who have suffered brain or spinal cord damage. *International Primate Protection League* v. *Tulane Educational Fund*, 895 F.2d 1056, 1058 (5th Cir. 1990). Second Declaration of William F. Raub, R. 0102-5. Dr. Joseph V. Brady, Chairman of the Board of IBR, strongly supported the research to be conducted in connection with the euthanasia. NIH App. B, para. 5.

C. The Proceedings Below

To preclude the euthanasia and subsequent experimentation, on December 28, 1988, Primate League, PETA, and others filed suit in the Civil District Court for the Parish of Orleans in the State of Louisiana again seeking custody of all the surviving Silver Spring Monkeys, and injunctive relief against the named defendants, the Administrators of the Tuane Educational Fund, the National Institutes of Health, and the Institutes for Behavior Resources. Pet. App. A-32, 39. The Petition also sought injunctive relief against the "agents and officers of NIH, [and] IBR." 895 F.2d at 1058; Pet. App. A-30-32.

The Louisiana state court issued a temporary restraining order against the only party then served which provided as follows:

> "It is ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys', placed in their keeping by the National Institute of health and/or the Institute for Behavioral Research." IBR App. A.

The United States Attorney accepted service on behalf of NIH and removed the case, under the authority of 28 U.S.C. § 1442(a)(1), to the United States District Court for the Eastern District of Louisiana. J.A. 1.[5] A second amended Petition for Removal was filed on January 20, 1989, again relying on 28 U.S.C. § 1442(a). A motion to remand was denied. Pet. App. A-17. After removal, petitioners moved for and secured a temporary restraining order ("TRO") from the district court which provided,

> "IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys'." IBR App. B.

As the district court extended the temporary restraining order beyond the 20 days permitted by Fed. R. Civ.

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[5] An "Amended Petition for Removal" was filed on January 13, 1989 "to correct a typographical error," changing the basis for removal to 28 U.S.C. § 1441(a). J.A. 16. From the context this change appears also to involve a typographical error. In any event, the United States contended in its Opposition to Plaintiff's Motion to Remand that the removal was proper pursuant to 28 U.S.C. § 1442(a), J.A. 21.

P. 65(b), the extended TRO became the functional equivalent of a preliminary injunction, appealable as such under 28 U.S.C. § 1292(a)(1). 895 F.2d at 1058.

The court below, concluding that the removal was proper, that the federal interest was adequately established, and that petitioners did not meet the standing requirement of Article III, vacated the district court order and dismissed the entire case. 895 F.2d at 1058-61.

After Primate League's Motion to Stay the Mandate was denied, Pet. App. A-26, on July 6, 1990, NIH performed the euthanasia and subsequent experiments on the three monkeys. Pet. 4 n.2, NIH Opposition 5. Earlier, another monkey had been euthanized and two had died. NIH Opposition 5. Four Silver Spring Monkeys continue to be cared for by the Delta Center under contract with their custodian NIH, with the consent of IBR, their owner. *See* Declaration of Dr. Joseph V. Brady, NIH App. B; Second Declaration of William F. Raub, R. 0102-5. Custody of these surviving monkeys is within the scope of the relief sought in the Petition for Declaratory and/or Injunctive Relief. Pet. App. A-32, 39.

On November 26, 1990 this Court granted the Petition for a Writ of Certiorari limited to the first question presented, namely the propriety of the removal of the case from the state court to the federal court.

SUMMARY OF ARGUMENT

1. The purpose of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), is to protect federal officers from interference by hostile state courts. To justify removal there must be a showing that the officer was acting under the laws of the United States and that the conduct at issue was necessary and proper in the performance of his duties. The removal is of the entire case, including state law issues. The removal protects the sovereign's interest in having the defense of official immunity, and other defenses, heard in federal court.

2. The plain language of the Section 1442(a)(1) phrase, "any officer of the United States or any agency

thereof," permits an agency as well as an officer of the United States to remove. [The statute separately also permits removal by "a person acting" under a federal officer. The meaning of this phrase and its applicability to NIH and to Tulane is considered in Summary of Argument paragraph No. 6 and in Section VI of this brief.] Petitioners' argument that officers of the United States and *officers of* agencies are the only parties who can remove incorrectly assumes that some officers of federal agencies are not officers of the United States, rendering one phrase of the statute superfluous. The IBR interpretation gives independent meaning to each phrase. The Court, on the basis of precedent, need not embrace a result so at odds with the purpose of the statute which would permit thwarting, through the expedient of a pleading device, congressional intent in having suits involving the official conduct of agents of the United States heard in federal court.

3. The removal in this case was proper so that the unnamed officers and agents of NIH, such as the Acting Director of NIH, Dr. Raub, against whom petitioners sought and secured relief, could be defended in federal court.

4. Even if an agency cannot remove in all circumstances, when, as here, job-related claims of federal employees are at issue, removal should always be allowed when equitable relief is sought against government employees.

5. The Third Circuit's opinion in the *Lovell* case, the only circuit court decision stating that agencies cannot remove, involved litigation in which at the time of remand there was no federal interest and no possibility of relief against any officer or employee of the United States. The language in the opinion on which petitioners rely can be regarded as dicta or an alternative holding. The *Lovell* court in effect rewrote the statute by adding the word "of" before the words "any agency."

6. Both NIH and Tulane were "persons" within the meaning of Section 1442(a)(1) acting under an officer of the United States. NIH acted under the Secretary of Health and Human Services. Tulane acted under contract with the Acting Director of NIH. Consequently, both were entitled to remove.

7. Petitioners ignore the fact that they filed suit seeking relief against "natural persons," agents and officers of NIH. This consideration alone justifies the removal.

8. Primate League has challenged the Fifth Circuit opinion on grounds not within the certiorari grant. The grant was only as to issue number one, the removal. They have sought to argue jurisdictional issues and the sufficiency of the federal interest. Even if all their arguments are considered, they are nevertheless incorrect and misstate the record.

ARGUMENT

I. THE PURPOSE OF THE FEDERAL OFFICER REMOVAL STATUTE, 28 U.S.C. §1442(a)(1), IS TO PROVIDE BOTH FEDERAL OFFICERS AND THE FEDERAL GOVERNMENT WITH A FEDERAL FORUM IN WHICH TO DEFEND OFFICIAL ACTION.

The history and purpose of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), is succinctly summarized in *Willingham* v. *Morgan*, 395 U.S. 402, 404-7 (1969).

"The first removal statute was included in an 1815 custom statute." *Id.* at 405. "It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done 'under color' of the statute. Obviously, the removal provision was an attempt

to protect federal officers from interference by hostile state courts." *Id.* "A new group of removal statutes came with the Civil War, and they were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws. Rev. Stat. § 643 (1874); Judicial Code of 1911, § 33, 36 Stat. 1097. Finally, Congress extended the statute to cover all federal officers when it passed the current provision as part of the Judicial Code of 1948. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947)." *Id.* at 405-6. The 1947 legislative history merely notes,

> "The revised subsection (a)(1) is extended to apply to all officers and employees of the United States or any agency thereof. Section 76 of title 28, U.S.C., 1940 ed., was limited to revenue officers engaged in the enforcement of the criminal or revenue laws. * * * Changes were made in phraseology." H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947).

As stated in *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880), the federal government

> ". . . can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, if their protection must be left to the action of the State court, the operations of the general government may at any time be arrested at the will of one of its members." 100 U.S. at 263.

Under the removal statute, if the "federal officers can raise a colorable defense arising out of their duty to enforce federal law," *Willingham* v. *Morgan*, *supra* at 406-7, the right of removal "is made absolute . . . ." *Id.* at 406. "[T]he removal statute is an incident of federal supremacy . . . ." *Id.* at 405.

The "under color of office" requirement generally means that the federal officer seeking removal must demonstrate an official function and the existence of a "colorable federal defense." *Mesa* v. *California*, 489 U.S. 121 (1989). This requires a showing that the federal officer was acting under the laws of the United States and that the conduct was necessary and proper in the performance of those duties. *In re Neagle*, 135 U.S. 1 (1889).

Unlike federal question removal under 28 U.S.C. § 1441, where the federal question must appear on the face of the complaint, under Section 1442(a)(1) the case can be removed even if the federal court would not have original jurisdiction over the action, and the federal interests appear only in the removal petition. *Poss* v. *Lieberman*, 299 F.2d 358, 359 (2d Cir. 1962), *cert. denied*, 370 U.S. 944 (1962).

The statute confers jurisdiction on the federal court to hear the case as well as the right of removal. *S. S. Silberblatt, Inc.* v. *East Harlem Pilot Block*, 608 F.2d 28, 35 (2d Cir. 1979). The removal is of the entire case though only one of its controversies involves a federal official, *IMFC Professional Serv. of Florida, Inc.* v. *Latin Am. Home Health, Inc.*, 676 F.2d 152, 158 (5th Cir. 1982), and only the federal official removes, *Bradford* v. *Harding*, 284 F.2d 307, 310 (2d Cir. 1960). Removal "does not revise or alter the underlying law to be applied," *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981). Removal is proper even when only state law issues are pleaded by the plaintiff. *Mir* v. *Frostburg*, 646 F.2d 342, 344 (9th Cir. 1980). Procedure after removal is governed by the Federal Rules of Civil Procedure, Fed. R. Civ. P. 81(b), and by 28 U.S.C. §§ 1446, 1447, 1448, 1449, 1450.

Removal is proper for actions commenced in state court that potentially expose a federal official to a civil or criminal penalty not only for acts performed in the past under color of office, but also with respect to "civil matters that seek to either prohibit or require certain

actions of a federal official in the future." *Florida* v. *Cohen*, 887 F.2d 1451 (11th Cir. 1989).

To avoid the defense of sovereign immunity, usually suits to enjoin governmental conduct are nominally brought against officers or agents of the government alleging that the officer or agent was acting in excess of his statutory authority, or that his conduct in the particular matter was constitutionally void. *See, e.g., Malone* v. *Bowdoin*, 369 U.S. 643 (1962); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703-5 (1949); *Blackmar* v. *Guerre*, 342 U.S. 512, 515 (1952).

The United States need not be named as a party defendant in addition to the federal official to involve the sovereign. *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Dugan* v. *Rank*; 372 U.S. 609, 620 (1963). As stated in *Portsmouth Redevelopment & Housing Auth.* v. *Pierce*, 706 F.2d 471, 473 (1983),

> "it is not necessary that the United States be denominated as a party. An action against a federal agency or official will be treated as an action against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act.' *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963)."

The removal thus permits "the defense of official immunity [to be] tried in federal court." *Willingham* v. *Morgan*, *supra* at 407. Both the federal employee and the federal government "require the protection of the federal forum." *Id.*

II. THE PLAIN LANGUAGE OF SECTION 1442(a)(1) PERMITS AN AGENCY TO REMOVE.

Section 1442(a)(1) provides, in relevant part, that an action commenced in state court may be removed to federal district court by "[a]ny officer of the United States or any agency thereof . . . for any act under color of such

office . . . ." 28 U.S.C. § 1442(a)(1). "[T]he right of removal under § 1442(a)(1)," this Court has observed, "is made absolute whenever a suit in a state court is for *any act* 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court." *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1968) (emphasis added).

In this case, petitioners contend that, despite its sweep, Section 1442(a)(1) does not permit removal of an action challenging indisputably federal acts, because the only federal defendant petitioners chose to name in the caption of their complaint is a federal agency, not a federal officer. Notwithstanding the facts that (1) NIH is, as a matter of federal law and the Supremacy Clause, immune from suit in state court, (2) NIH may not, as a matter of federal law, be sued in its own name, and (3) NIH cannot act except through its officers and employees, petitioners insist that they can foreclose federal adjudication of NIH's official defenses to this suit through the simple expedient of failing to identify by name the federal officers they seek to restrain. Indeed, petitioners argue that the plain language of the statute compels acquiescence in such circumvention of the statute. As respondent IBR demonstrates below, the language of the statute does not require any such self-defeating construction. Moreover, this Court should reject any reading of the statute that leads to so unreasonable a result.

A. Petitioners' "Plain Language" Argument Fails

Ignoring the purposes of the removal provision altogether, petitioners focus exclusively on the caption and syntax of Section 1442(a)(1), which, they argue, can only be read to permit federal officers, or those acting under the direction of such officers, to remove state court actions challenging federal activities. The language of the statute, however, is hardly so clear as to compel the result petitioners seek. Subsection (1) identifies the juridical "person" who may remove an action under subsection (a) as "[a]ny officer of the United States *or any*

agency thereof." 28 U.S.C. § 1442(a)(1) (emphasis added). On its face, this language does not plainly preclude the possibility that an agency is entitled to invoke the protection of a federal forum; on the contrary, it can be read literally to identify two entities: federal officers *and* federal agencies. *See* Wright & Miller, *Federal Practice and Procedure* § 3727, at 458 (1985 ed.) ("Wright & Miller") (noting that, while syntax of the section supports the construction that agencies cannot remove, "it also would support the contrary conclusion"). As petitioners construe it, the statute, in effect, permits removal by "[a]ny officer of the United States or *of* any agency thereof." *See* Pet. Brief at 9. This is not the language Congress employed.

[The statute separately also permits removal by "a person acting under" a federal officer. The meaning of this phrase and its applicability to NIH and to Tulane are considered in Section VI, *infra*, p. 34.]

Petitioners insist, however, that when the opening clause of subsection (1) is read together with the clause that follows it, the subsection as a whole can only be understood to permit removal by federal officers. Thus, they note, Congress provided for removal by "[a]ny officer of the United States or any agency thereof, or person acting under *him*." *See* Pet. Brief at 10. The personal pronoun, petitioners submit, makes plain that the opening clause refers only to officers—either of the United States or of federal agencies—but not to federal agencies themselves. *Id.* This argument requires rewriting he statute. See Section V, *infra*, p. 31.

Petitioners' argument has additional difficulties: it necessarily assumes, illogically and incorrectly, that some officers of federal agencies are *not* officers of the United States. Indeed, without this illogical assumption, the language "or any agency thereof" is entirely superfluous, a result that militates strongly against petitioners' "plain meaning" construction. *See Mackey* v. *Lanier Collection Agency*, 486 U.S. 825, 839 n.14 (1988) ("the suggestion

that Congress intentionally adopted, at a single time, two separate provisions having the same meaning . . . calls a particular statutory interpretation into question"); 2A Sutherland, *Statutes and Statutory Construction* § 46.06 (Sands 4th ed. 1984) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute").

Section 1442(a)(1) does not define the terms "agency" or "officer" of the United States, and the terms themselves are not self-defining. Accordingly, this Court necessarily must look beyond the plain language of the statute to ascertain their meaning. Section 451 of title 28 provides that, for purposes of the judicial code, the term "agency" includes

> "any department, independent establishment, commission, administration, authority, board or bureau *of the United States* or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 28 U.S.C. § 451 (emphasis added).

Clearly, officers of "any department, independent establishment, commission, administration, authority, board or bureau *of the United States*" must be officers of the United States.[6] Although less clear on its face, the phrase "any corporation in which the United States has a proprietary interest" is limited to those corporations that perform governmental functions and are owned and/or managed by the United States itself;[7] it does *not* include

[6] Several of the terms employed in Section 451 are themselves defined in the Government Organization and Employees Act, 5 U.S.C. § 101 *et seq.* This Act, which defines the executive and military "department[s]" (§§ 101 and 102), "government corporation" (§ 103), and "independent establishment" (§ 104), leaves little doubt that the officers of such entities are necessarily officers of the United States.

[7] *See In re Hoag Ranches*, 846 F.2d 1225, 1227-29 (9th Cir. 1988) (fact that a corporation is federally chartered or is a federal instrumentality is not dispositive under Section 451; a privately

"those corporations in which the interest of the Government is custodial or incidental."[8] Consistent with this definition, Section 103 of title 5 provides that a "government corporation" is "a corporation owned or controlled *by the Government of the United States*," 5 U.S.C. § 103 (emphasis added), and Section 105 in turn explains that a "government corporation" is an "Executive agency." *Id.* § 105. These definitions leave little room for Primate League's assumption—critical to its construction—that some officers of a United States "agency" are nevertheless *not* officers of the United States.

The contrary conclusion, moreover, is buttressed by the Administrative Procedure Act ("APA") and the federal civil service laws. The APA, which petitioners themselves look to for interpretive guidance,[9] and which, like the removal statute, concerns the manner and extent to which the actions of federal agencies may be challenged in the courts,[10] defines "agency" as "each authority of the gov-

owned and operated Production Credit Association, despite its federal origins, is not a federal agency); *Rauscher Pierce Refres, Inc.* v. *FDIC*, 789 F.2d 313, 315-16 (5th Cir. 1986) (FDIC is a federal agency: its Board is appointed by the President and includes the Comptroller of the Currency; the Secretary of the Treasury oversees aspects of its finances; and its management is "inextricably intertwined in the federal government"); *Government Nat'l Mortgage Ass'n* v. *Terry*, 608 F.2d 614, 618-20 (5th Cir. 1979) ("Ginnie Mae" is part of the Department of Housing and Urban Development ("HUD"), "is completely controlled by HUD," and is financed by the federal government, is a federal agency); *Walton* v. *Howard University*, 683 F. Supp. 826, 830-31 (D.D.C. 1987) (American Red Cross's independence from governmental control places it outside scope of Section 451 definition of agency).

[8] 18 U.S.C. § 6, Historical and Revisions Notes. The Revisions Notes to Section 451 explain that "[t]he definitions of agency and department [in Section 451] conform with such definitions in section 6 of revised title 18."

[9] *See* Pet. Brief at 10.

[10] *See* 5 U.S.C. §§ 551-559, 701-706. Congress, moreover, enacted the APA in 1946, just two years before passing the current removal provision. Given the temporal proximity and related subject matter

ernment of the United States." 5 U.S.C. § 551(1).[11]

Officers of such authorities of the United States must themselves be officers of the United States itself. Indeed, this fact is confirmed by the federal civil service laws, which define an "officer," other than a judicial or military officer, as

> "an individual who is—(1) required by law to be appointed in the civil service by . . . the President . . . [or] the head of an Executive agency . . . (2) engaged in the performance of a Federal function under authority of law or an Executive act; and (3) subject to the supervision of [the appointing] authority . . . while engaged in the performance of the duties of his office." 5 U.S.C. § 2104.

It is inconceivable that an officer of a federal agency, appointed by the President or the head of an executive agency performing a federal function pursuant to federal

of the two enactments, it is reasonable to look to the APA for guidance as to the meaning of the term "agency." *Cf. Communications Workers of Am.* v. *Beck*, 108 S. Ct. 2641, 2648-49 (1988) (identical language in statutes with like purposes should be construed in like manner).

[11] The Act excludes from its definition "(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia . . . (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined thereby; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions [concerning federal insurance of home mortgages or exercised by the Administrator of General Services]." 5 U.S.C. § 551(a). Indeed, these exclusions bolster reliance on the APA, for the most significant "exceptions" are paralleled by specific "inclusions" in the removal statutes. Thus Section 1442(a)(3) and (4) addresses removal of actions involving two entities—Congress and the courts of the United States—that are excluded from the APA's definition of agencies. Similarly, Section 1442a mirrors the APA by permitting removal in actions involving authority exercised "under a law of the United States respecting the armed forces thereof, or under the law of war." 28 U.S.C. § 1442a.

law and subject to the supervision of the President or the head of an executive agency, would *not* be an officer of the United States.

Taken together, these definitions reveal the fundamental flaw in petitioners' construction of subsection (a)(1): while Primate League insists that the phrase "or any agency thereof" refers to *officers* of federal agencies, such persons are entirely subsumed within the phrase "[a]ny officer of the United States"; petitioners' "plain meaning" interpretation thus renders a phrase of the statute completely superfluous. The interpretation urged by IBR, on the other hand, avoids this redundancy and thereby gives independent meaning to each phrase.

B. The Court Should Construe Section 1442(a)(1) so as To Avoid a Result Completely at Odds with the Statute's Purpose

As respondent IBR demonstrated above, the plain language of the statute does not compel a construction completely at odds with its purpose. Even if the Court determines, however, that the statutory language favors petitioners' Construction, the Court should nevertheless construe the provision to permit removal by federal agencies.

This Court has recognized on a number of occasions that "[w]here the literal reading of a statutory term would compel an odd result," or a result that is "difficult to fathom," it is proper to "search for other evidence of congressional intent to lend the term its proper scope." *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558, 2566 (1990) (citations and internal quotation marks omitted); *see also Green* v. *Bock Laundry Mach. Co.*, 109 S.Ct. 1981, 1994 (1989) (Scalia, J., concurring) (where statute, "if interpreted literally, produces an absurd . . . result[,]" the Court's "task is to give some alternate meaning" to the statutory language . . . "that avoids this consequence"); *United States* v. *Public Utilities Comm'n of California*, 345 U.S. 295, 315-16 (1953) ("when the literal words would bring about

an end completely at odds with the purpose of the statute," courts may properly rely on legislative purpose and intent). As Judge Learned Hand observed, although

> "the words used, even in their literal sense, are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).[12]

The disposition that follows from petitioners' "plain language" construction is as 'unfathomable" as any that has led this Court to reject literal interpretations of statutes in the past. There can be no dispute (1) that NIH is a federal agency enjoying sovereign immunity from suit in state court;[13] (2) that NIH may not be sued in its own name;[14] (3) that the actions petitioners sought to enjoin were acts taken by, or at the direction of, federal officers acting under color of their office; and (4) that, had petitioners named as defendants the officers whose acts or directions they sought to enjoin, such as Dr. Raub, he could have removed the suit to federal court. Nor is there any question that Section 1442(a)(1), as an incident of federal supremacy, is designed to prevent state law and state court interference with federal activities by ensuring that the defense of official immunity can be raised and decided in federal court in accordance with federal law.

[12] *See also Watt* v. *Alaska*, 451 U.S. 259, 266 (1981) ("[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect").

[13] *See, e.g., Dugan* v. *Rank*, 372 U.S. 609, 620-22 (1963). As the United States Department of Justice has noted, the Administrative Procedure Act contains a waiver of sovereign immunity that may apply to the activities of NIH, but that waiver applies only to suits brought in federal court. Brief for National Institutes of Health in Opposition to Petition for Certiorari at 12 & n.11.

[14] *See Blackmar* v. *Guerre*, 342 U.S. 512 (1952) (agency may not be sued in its own name in the absence of statute authorizing such suit). There is no such authorization with respect to NIH.

If Section 1442(a)(1) is nevertheless read to preclude removal by federal agencies, the entire purpose of the statute can be thwarted at the whim of plaintiffs. Under such a reading, petitioners' improper designation of NIH as defendant will prevent the federal officers whose actions or directions petitioners sought to and did restrain from gaining access to the federal forum Congress unmistakably intended to provide. Moreover, it will leave to the state courts the determinations whether NIH can be sued in its own name, and whether NIH officers and those acting at their direction are acting pursuant to a grant of federal authority that precludes the injunctive relief petitioners seek. These are all matters that Congress undeniably intended to have adjudicated in federal courts under federal law. It is simply inconceivable that Congress could have intended, or even have envisioned, that the language it employed in Section 1442(a)(1) would so readily permit circumvention of the statute and frustration of the policies underlying it.

In a comparable setting, this Court recently declined to apply a statute according to its literal terms where to do so would allow a plaintiff to thwart congressional intent through the expedient of a pleading device. In *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304, 2311 (1989), the Court ruled that state officials are not subject to suit under 42 U.S.C. § 1983, which imposes liability on "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" causes a deprivation of another's civil rights. Acknowledging that "state officials literally are persons," the Court reasoned that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . [and,] [a]s such, it is no different from a suit against the State itself." *Id.* Having previously concluded that states are

not "persons" within the meaning of the statute, the Court concluded that there was "no reason to adopt a different rule in [suits against state officers], *particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.*" *Id.* (emphasis added).

The present case permits the exact obverse situation. Petitioners' suit for injunctive relief here, though nominally against NIH itself, is also a suit to restrain the acts of NIH "agents, officers, representatives, employees." Pet. App. A-32. Because it is clear that a suit against the latter would be removable, there is no reason to adopt a different rule here and thereby allow petitioners to circumvent Congress' intent through a mere pleading device.

Indeed, departing from an unreasonable interpretation of the statute is even more justified here than it was in *Will*. As part of the same 1948 revisions to the Judicial Code that created the present version of Section 1442(a)(1), Congress revised Section 1445, the "nonremoval" provision pertaining to Federal Employee Liability Act suits against railroads. The revision made clear that such suits remained nonremovable when brought against a bankrupt railroad's receiver or trustee who, technically, is an "officer of the courts of the United States" within the meaning of Section 1442(a)(1). The revisers explained that "the subject matter *rather than legalistic distinctions as to the identity of the parties* is made [the] determinative consideration." *See* 28 U.S.C. § 1445, Revision Notes (emphasis added). The same regard for substance rather than "legalistic distinctions" that prompted the amendments to Section 1445—and that drove this Court's analysis in *Will*—dictate that Section 1442(a)(1) be construed to permit removal by federal agencies as well as their officers.

Petitioners, moreover, have identified nothing in the legislative history or purpose of the statute that justifies the self-defeating construction they urge. Relying on

Professor Moore's treatise, petitioners argue that because Section 1442(a)(1)'s antecedents applied only to revenue officers, the statute is designed to protect federal officers alone from interference by hostile state courts. *See* Pet. Brief at 11. This argument, however, ignores the obvious fact, articulated by this Court over a century ago, that the federal government "can act only through its officers and agents," and that interference with the federally authorized activities of these officers effectively "arrest[s]" the "operations of the general government" itself. *Tennessee* v. *Davis*, 100 U.S. at 263. Indeed, even courts that have adopted petitioners' construction have acknowledged that

> "the distinction between the officer and the agency represented by him is an artificial one, resting more on form than substance, and . . . the same principles which permit the officer . . . to remove *should apply equally well to the . . . agency itself.*" *Lance International, Inc.* v. *Aetna Cas. & Sur. Co.*, 257 F. Supp. 349, 355 (S.D.N.Y. 1967) (emphasis added).

See also Lovell Mfg. Div. of Patterson-Erie Corp. v. *Export-Import Bank of the United States*, 843 F.2d 725, 733 (3d Cir. 1988) ("sound policy arguments . . . favor . . . allowing federal agencies . . . to have an automatic right of removal").[15]

There can thus be little dispute that the purposes underlying Section 1442(a)(1) justify removal by agencies themselves.[16] Grasping for some "policy" that justifies

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[15] *See also* Wright & Miller § 3727, at 458-59 (while "several decisions have held that . . . the statute applies only to officers, and not to federal agencies as such . . . it is unlikely that this was Congress' intention in enacting the statute").

[16] The only other rationale courts have advanced in support of a contrary interpretation is that Congress can be said to have excluded agencies from Section 1442(a)(1) because it "has already provided ample protection against tort suits for its agencies . . . in the Federal Tort Claims Act, and any other claims which could be brought in state court are barred by sovereign immunity." *Gensplit Finance Corp.* v. *Foreign Credit Ins. Ass'n*, 616 F. Supp. 1504, 1510 (E.D. Wis. 1985); *see also City of Alma* v. *Bell, Galyardt*

the result they seek, petitioners contend that "a liberal interpretation of section 1442(a)(1) that would allow removal whenever a federal agency is involved threatens to broaden removal jurisdiction far beyond original jurisdiction." Pet. Brief at 16. This Court, however, has already disposed of this argument. In *Mesa* v. *California*, 489 U.S. 121, 129 (1989), the Court explained that § 1442(a)

> "cannot independently support Art. III 'arising under' jurisdiction. *Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes.* The removal statute itself merely serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged." *Id.* at 136 (emphasis added).

Indeed, it was for this reason that the Court concluded that a state suit cannot be removed pursuant to Section

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& Wells, Inc., 606 F. Supp. 686, 690 (D. Neb. 1985) (same); *Lowe* v. *Norfolk & Western Ry. Co.*, 529 F. Supp. 491, 494 (S.D. Ill. 1982) (same). The difficulty with this argument is that it leaves determination of the federal sovereign's immunity to state courts, whereas Congress, in § 1442(a)(1), "decided that . . . the Federal Government . . . require[s] the protection of a *federal forum*." *Willingham* v. *Morgan*, 395 U.S. at 407 (emphasis added). Perhaps recognizing this, the courts in *City of Alma* and *Lowe* effectively adjudicated the federal agencies' claims of immunity by ruling that, although removal under § 1442(a)(1) and § 1441(a) was improper, the claims against the agencies had to be dismissed rather than remanded because the state courts lacked jurisdiction. *City of Alma*, 606 F. Supp. at 691-92; *Lowe*, 529 F. Supp. at 496-97. However, the correctness of such dispositions is doubtful. Sovereign immunity is not a jurisdictional defense but is properly asserted, in terms of a failure to state a cause of action. *New Jersey Dep't of Envtl. Protection* v. *Gloucester Envtl. Management*, 719 F. Supp. 325, 335 (D.N.J. 1989). Were the court below to have dismissed NIH on the ground that the state court did not have jurisdiction over it, and remanded the non-federal defendants to state court, it would have been a useless act since Tulane itself then could have removed the entire action back to federal court. See Section VII, *infra*, at p. 34.

1442(a)(1) simply because it is brought against a federal defendant; rather, removal under the statute "must be predicated upon averment of a federal defense." *Id.* at 139. Construing Section 1442(a)(1) to permit removal by federal agencies, therefore, will work no expansion in the jurisdiction of the federal courts. As with other federal defendants, an agency can properly remove only where, as here, there is a federal defense to the plaintiff's state law claims.

Finally, petitioners suggest that removal is improper here because this case presents "issues of state law that are within the peculiar province of the Louisiana state courts to resolve." Pet. Brief at 17. This argument completely misapprehends the purpose and operation of Section 1442(a)(1). As a matter of federal supremacy, Congress has determined that when a federal defendant raises a federal defense in an action brought in state court, the defendant has the right to have the validity of that *defense* determined in federal court in accordance with federal law. "At the same time, the invocation of removal jurisdiction by a federal officer does not revise or alter the underlying law to be applied." *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981). Just as in a diversity action, therefore, the federal court can and must apply the underlying state law, but only to the extent that a federal defendant's official immunity does not otherwise shield that defendant from the operation of state law.

III. THE REMOVAL OF THE CASE BELOW ON BEHALF OF NIH FROM STATE COURT TO FEDERAL COURT WAS NECESSARY AND PROPER SO THAT THE "AGENTS AND OFFICERS" OF NIH, AGAINST WHOM RELIEF WAS SOUGHT, COULD BE DEFENDED IN FEDERAL COURT.

Petitioners, when they filed their state court action, named NIH as a defendant and sought relief not only against NIH, but against also its "agents, officers, representatives, employees." Pet. App. A-31-32.

The Civil District Court for the Parish of Orleans on December 29, 1988 issued a temporary restraining order against Tulane, the only party then served, which provided as follows:

> IT IS ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys', placed in their keeping by the National Institutes of Health and/or the Institute for Behavioral Research." IBR App. A.

After the case was removed to federal court, petitioners moved to restrain "NIH and their agents, attorneys, and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys.'" IBR App. B.

The District Court granted the motion and issued a TRO which provided:

> "IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys, and servants, from inhumane treatment, or euthanasia or other destruction of monkeys known as the 'Silver Spring Monkeys'." IBR App. B, at 2.

It was clear that petitioners were seeking to preclude NIH and its employees, including its Acting Director, Dr. Raub, from taking specified actions with respect to the Silver Spring Monkeys. Pet. App. A-31-32. As the Fifth Circuit concluded, ". . . the planned euthanasia on the monkeys and accompanying research is in furtherance of NIH's statutory mission to conduct and fund biomedical research." 895 F.2d at 1062.[17]

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[17] The sufficiency of the "federal interest" as found by the court below is not now subject to review because "[t]he petition for a writ of certiorari [was] granted limited to Question 1 presented by the petition." Question 1 deals only with the removal. Question 2 dealt with the federal interest. Question 3 dealt with standing. See Section VIII.C, *infra*, p. 39.

The injunctive relief sought against the agents and officers of NIH would have precluded the conduct of Dr. Raub's official duties, and that of other NIH employees, and was thus a suit against the sovereign. *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *Portsmouth Redevelopment and Housing Auth.* v. *Pierce*, 706 F.2d 471, 473 (1983).

It is precisely in circumstances such as those present here, where sovereign immunity and official immunity may be at issue, that removal is required. *Willingham* v. *Morgan*, *supra*, at 407. As this Court observed in *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880), to deal with such threats to its operations "the general government" should not be "powerless" to protect its own interest by protecting the interests of its officers and agents in federal court since the government can only act through such officers and agents.

To hold otherwise would do violence to congressional intent. As was stated in *Jones* v. *Elliott*, 94 F. Supp. 567, 568 (E.D. Va. 1950), the federal officer removal statute

> ". . . accomplishes, with minimal confusion, the evident Congressional purpose that all suits against officers of the Government, for acts done within the ambit of their authority, be tried only in the courts of the United States. *State of Tennessee* v. *Davis*, 100 U.S. 257."

Even though the removal was sought on the basis that NIH as an "agency" was entitled to remove, and the trial court and the court below also justified the removal on that ground, the record establishes that—to track the wording of the statute, "a civil action . . . [was] commenced in a state court" seeking relief against officers of the United States, and it was removed to federal court.

Since the agents and officers against whom relief was sought were not named either in the caption or in the body of the "Petition for Declaratory and/or Injunctive Relief," Pet. App. A-30-32, there was no way the removal could have been sought in their names. However, it would be excessively formalistic to condition removal on the style of the case, rather than on the relief sought against federal officers. For example, in *Johnson* v. *Showers*, 747 F.2d 1228 (8th Cir. 1984), the Eighth Circuit allowed a Section 1442(a)(1) removal by an agency ". . . based on the government's unopposed view that the action should be deemed as one brought against FEMA's Director . . ." even though FEMA's Director was not named in the caption or body of the complaint. 747 F.2d at 1229.

In sustaining removal of a variety of proceedings not clearly "civil actions," courts have concluded that "the statute looks to the substance rather than the form of the state proceeding." *North Carolina* v. *Carr*, 386 F.2d 129, 131 (4th Cir. 1967) (state court contempt proceeding variously argued to be "criminal," "civil" or "sui generis," *id.*); *Kolibash* v. *Committee of Legal Ethics of W. Va. Bar*, 872 F.2d 571, 576 (4th Cir. 1989) (state bar disciplinary proceeding); *Nationwide Investors* v. *Miller*, 793 F.2d 1044, 1447 (9th Cir. 1986) (garnishment proceeding involving Army Air Force Exchange Service).

Additionally, substance rather than form dictates that a suit is regarded as one against the sovereign, even if the United States is not named as a defendant, if the effect of the judgment would be "to restrain the government from acting, or to compel it to act." *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963), quoting *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). Similarly, a suit should be regarded as being against a government officer or employee if its objective, as here, is to restrain an officer or employee, such as Dr. Raub, from acting, or compelling him to act.

In light of the important public policy considerations applicable to actions such as this one, the availability of removal to federal courts should be based on the reality of the relief sought. It should not turn on such irrelevant factors as the incompetence or deviousness of counsel who draft the petition.

Because relief was sought against NIH employees, the Fifth Circuit was correct in sustaining the removal under 28 U.S.C. § 1442(a)(1).

IV. WHETHER OR NOT AN AGENCY CAN REMOVE UNDER ALL CIRCUMSTANCES, REMOVAL SHOULD ALWAYS BE PERMITTED TO ENSURE THAT JOB-RELATED CLAIMS AGAINST FEDERAL EMPLOYEES ARE HEARD IN FEDERAL COURT.

The federal officer removal statute ensures that job-related litigation involving federal employees is heard in federal court. Removal by an agency is proper to achieve this purpose even if agencies are not entitled to remove under all circumstances.

For example, in *Boron Oil Co.* v. *Downie*, 873 F.2d 67 (4th Cir. 1989), an employee of the Environmental Protection Agency ("EPA") was subpoenaed to testify in a state court trial. EPA's motion to quash the subpoena was denied. EPA then

> "promptly removed the subpoena proceeding (but not the underlying civil action) to the United States District Court . . ." 873 F.2d at 68.

The Fourth Circuit found nothing objectionable in having the validity of the subpoena tested in federal court after removal by EPA.

In *Loftin* v. *Rush*, 767 F.2d 800 (11th Cir. 1985), a state court summons of garnishment was served on Rush's employer, the United States Navy. Subsequently, a default judgment against the Navy was secured. The judgment had the effect of changing the United States from a stakeholder into a debtor. *Id.* at 804. The Eleventh Cir-

cuit did not question the removal by the Navy of the state court action to federal court. 767 F.2d at 802. The removal ensured that an action involving the disbursal of Treasury funds by employees of the Navy would be heard in federal court. *Id.* at 804-5.

These principles are particularly applicable to all actions seeking injunctive relief, such as in this case. In all actions against a federal agency, an injunction against it would also be binding on its "officers, agents, servants, employees . . ." by virtue of the provisions of Fed. R. Civ. P. 65(d), and similar provisions applicable in state courts.

The reach of an injunction is nationwide and extends to non-parties with knowledge of the injunction whereever located. As stated in *Waffenschmidt* v. *Mackey*, 763 F.2d 711 (5th Cir. 1985):

> "The nationwide scope of an injunction carries with it the concomitant power of the court to reach out to non-parties who knowingly violate its orders" 763 F.2d at 717.

Clearly, the relief sought and the TRO issued by the District Court in Louisiana extended to the highest levels of NIH in the Washington, D.C. metropolitan area and restrained official conduct by the Acting Director of NIH, Dr. William F. Raub.

Even if the petition did not, as here, specifically seek relief against the officers and agents of the agency, they nevertheless would be bound by an injunction against the agency if they had knowledge of it. In such circumstances only removal by the agency could protect its unidentified agents and employees from being bound by a state court adjudication.

V. THE THIRD CIRCUIT REMAND ORDER IN THE *LOVELL* CASE CAN BEST BE EXPLAINED BY THE POST-REMOVAL ELIMINATION OF ANY FEDERAL INTEREST.

Petitioners are correct that the district courts are divided on the question of whether a federal agency can remove a case to federal court under 28 U.S.C. § 1442(a)(1).

The Courts of Appeals are also divided on this question. The Fifth Circuit, in the opinion below and in other cases, the Fourth Circuit in *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 68 (4th Cir. 1989), the Eighth Circuit in *Johnson* v. *Showers*, 747 F.2d 1228 (8th Cir. 1984), and the Eleventh Circuit in *Loftin* v. *Rush*, 767 F.2d 800, 802 (11th Cir. 1985), have held or assumed that the objective of the removal statute can be better achieved by permitting agencies, as well as their officers, to remove cases to federal court under 28 U.S.C. § 1442(a)(1). Only the Third Circuit has articulated the opposite view. *See Lovell Mfg., Div. of Patterson-Erie Corp.* v. *Export-Import Bank of the U.S.*, 843 F.2d 725 (3d Cir. 1988).

The *Lovell* court concluded that the phrase in Section 1442(a)(1), "person acting under him," means that an "officer" under whom a person could act can remove, but that an "agency" cannot because an "agency" is not a "him" under which a person could act. 843 F.2d at 733. The court also stated ". . . we cannot read a statute to say what it does not say . . ." *Id.* This hyperbole is not convincing. Taken literally, the statute provides that "any officer of the United States or *any agency* [*of the United States*]" may remove. The *Lovell* court, to reach its result, had to in effect change the statute to read, "Any officer of the United States or *any officer of* any agency of the United States" may remove. The court has, in effect, added the words "any officer of" before "any agency." In so doing, the court has limited and qualified

the plain language of the statute: *"any agency thereof" (meaning of the United States) may remove.*

Similarly, petitioners, in purporting to describe the statute, change its "any agency thereof" phrase to read "an officer of an agency." Pet. Brief at 9. This hardly can be said to be following "the statute itself," an approach petitioners claim to advocate. *See* Pet. Brief at 8.

The Third Circuit's parsing of the statute should properly be regarded as dicta or, at best, an alternative holding. As stated in *New Jersey Dep't. of Envtl. Protection* v. *Gloucester Envtl. Management*, 719 F. Supp. 325, 334 (D.N.J. 1989),

> "That reading was only dicta, or, at most, an alternative holding. After the appeals court concluded that section 1442(a)(1) must be read to prevent agencies from invoking it, it went into a lengthy analysis of why it lacked jurisdiction under that section even if Eximbank properly removed the case under section 1442(a)(1) as a federal agency."

The *Lovell* case involved a suit against the Export-Import Bank of the United States ("Eximbank") and the Foreign Credit Insurance Association ("FCIA"), an association of private insurance companies formed to support Eximbank's statutory mandate of promoting United States exports. 843 F.2d at 727. One claim by the exporter, Lovell, was against FCIA on a commercial risk policy. A second claim was against Eximbank on a political risk policy. *Id.*

Shortly after the case was removed by Eximbank from state to federal court, Lovell dropped the political risk policy claim against Eximbank. Accordingly, the litigation then was "predominantly, if not exclusively, a state law claim against an association of private insurance companies." 843 F.2d at 728, 732. Eximbank's only involvement was based on a separate reinsurance agreement with FCIA to which Lovell was not a party. *Id.* Thus Eximbank was only a "nominal defendant" and as the court observed ". . . no reason appears why Eximbank has not been formally dismissed from this case." 843 F.2d at 731 n.8.

At the time of the remand order Lovell's suit could not have resulted in a judgment against Eximbank. Eximbank's "tangential interest" [18] could only have been in not having a reinsurance contract claim made by FCIA against the United States, presumably in the United States Claims Court under 28 U.S.C. § 1491. Even in the event of such litigation there could not have been a judgment for Lovell against Eximbank, but only against the United States. Nor could Lovell have secured relief against an officer of Eximbank either in the then pending case or in follow-up litigation.

Since, as the Third Circuit concluded, "the purpose of a section 1442(a)(1) removal is to protect federal officials from unfriendly state forums . . . for conduct performed under color of federal office," it reasoned that it was doubtful that allowing removal where relief could be secured only against private insurance companies would serve any such purpose. 843 F.2d at 734 n.13. Accordingly, a remand to state court was directed. 843 F.2d at 735.

Additionally, after the claim against Eximbank had been dropped there was no longer an "act under color of such office" at issue in the proceeding, and therefore no reason for it to remain in federal court.

The court properly concluded that it had discretion to direct a remand to state court of what had become "a non-federal suit" that "simply does not belong in federal court." *Id.* at 734.

There is no holding in *Lovell* that should lead this Court to preclude removal, where, as here, relief is specifically sought against officers and agents of a federal agency involving conduct directly related to their employment.

---

[18] 843 F.2d at 733.

VI. THE WORD "PERSON" IN THE SECTION 1442(a)(1) PHRASE "PERSON ACTING UNDER HIM", INCLUDES BOTH AGENCIES AND TULANE AS JURIDICAL PERSONS ENTITLED TO REMOVE.

A. NIH Is a "Person" Entitled to Remove.

In *National Audubon Soc'y* v. *Department of Water*, 496 F. Supp. 499 (E.D. Cal. 1980), the court was called upon to determine if the Bureau of Land Management could be considered a juridical person acting under the direction of the Secretary of Interior, and if the Forest Service had similar status, being under the direction of the Secretary of Agriculture, and were thus "persons" entitled to remove under Section 1442(a)(1). *Id.* at 503.

In its analysis the court first concluded that the meaning of the statute was not "plain and unambiguous." *Id.* at 508.

The court also found the case law at the time to be "scanty and inconclusive." *Id.* Relying on this Court's teaching in *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969) that "section 1442(a)(1) must not be given a narrow grudging interpretation" and that "the Federal Government itself[] require[s] the protection of the federal forum." *id.*, the court, held as follows:

> "It is with these principles in mind that the court addresses the issue presented. As the Supreme Court notes, the United States can only act through its officers and employees (i.e. human beings). In like manner its agencies may only act through human beings. Although clearly the historical origin of Section 1442 was the protection of individual officers, its purpose has been broadened by amendment and now may be seen to rest on a 'federal interest' (*Willingham*, *supra* at 406, 89 S. Ct. at 1815) and is an 'incident of federal supremacy' (*Id.* at 405, 89 S. Ct. at 1815). Given the values now recognized as the underpinning of Section 1442, and the broad reading the court must give the section, *it appears*

> *that the word 'person' might reasonably be read to encompass the government's agencies*" (emphasis supplied). 496 F. Supp. at 508.

The court noted that for some purposes, the word "persons" may include corporations, municipalities, or foreign governments. *Id.* at 507 n.7. Under Section 1442 (a)(1) corporations and entities other than individuals have been considered to be "persons" acting under the direction of a federal officer and entitled to remove. *Group Health Inc.* v. *Blue Cross Ass'n*, 587 F. Supp. 887, 890 (S.D.N.Y. 1984).

For example, on this basis removal has been allowed by a national bank authorized to maintain facilities on military bases, *Texas* v. *National Bank of Commerce*, 290 F.2d, 229, 231 (5th Cir. 1961), *cert. denied*, 368 U.S. 832 (1961); by a quasi-public Puerto Rican telephone corporation assisting federal agents conducting telephone wiretaps, *Camacho* v. *Autoridad De Telephonos De Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989); by a private insurance company under contract with the government to administer social security benefits, *Kunstler* v. *Occidental Life Ins. Co.*, 292 F. Supp. 532 (C.D. Cal. 1968); by a professional corporation of attorneys funded by OEO, *Gurda Farms, Inc.* v. *Monroe County Legal Assistance Corp.*, 358 F. Supp. 841 (S.D.N.Y. 1973); by a corporate bus tour operator under contract with the Secretary of Interior, *District of Columbia* v. *Landmark Tours Serv. Inc.*, 411 F. Supp. 1002 (D.D.C. 1976); by the National Association of Securities Dealers conducting disciplinary proceedings against by a broker-dealer as "an agent or arm of the SEC," *Braun, Gordon & Co.* v. *Hellmars*, 502 F. Supp. 897, 902 (S.D.N.Y. 1980); by a medical service organization under contract with the Secretary of Health, Education and Welfare Department to treat Medicare patients, *Allen* v. *Allen*, 291 F. Supp. 312, 313 (S.D. Iowa 1968); and by a local dam authority operating floodgates under the direction of the United States Army Corps of Engineers, *Teague* v.

Grand River Dam Authority, 279 F. Supp. 703 (N.D. Okla. 1968).

In the context of this case, NIH, as a part of the Public Health Service, 42 U.S.C. § 203, can be considered to be a person acting under the direction of the Secretary of the Department of Health and Human Services. 42 U.S.C. § 202 provides,

> "The Public Health Service in the Department of Health and Human Services shall be administered by the Surgeon General under the supervision and direction of the Secretary."

If a local dam authority acting on verbal instructions from the Army Corps of Engineers can be a "person" within the meaning of the statute, a government agency statutorily required to follow the instruction of the Secretary of Health and Human Services should also be a "person" acting under "an officer of the United States" and entitled to remove. Such an interpretation serves to protect the federal interest.

Primate League contends that inasmuch as Congress defined the word "person" to exclude "agencies" in the Administrative Procedure Act, a similar exclusion should apply with respect to Section 1442(a)(1). Pet. Brief at 9-10. However, the meaning of the word "person" must depend on the context. The Administrative Procedure Act deals with such subjects as the rights of persons "suffering legal wrong because of agency action . . . ." 5 U.S.C. § 702. Viewed in that context it would make no sense to protect agencies from themselves by defining them as persons. However, the legislative history makes it clear that action by "persons" can constitute "agency action." In other words, "persons" can be "agencies" within the meaning of the APA. As stated in the Attorney General's Manual on the Administrative Procedure Act at 9 n.1 (1947),

> "The legislative history of section 2(a) illustrates . . . [i]t is necessary to define agency as 'authority' . . . 'The word "authority" is advisedly used as

> meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau) because *the real authorities may be some subordinate or semi-dependent person or persons* within such form of organization.' (Sen. Doc. p. 196). See also H.R. Rep. p. 19 (Sen. Doc. p. 253)." (Emphasis added.)

Defining the term "person" to include governmental entities is not uncommon. For example, Primate League in its request for the production of documents served on NIH defined the term "person" and "persons" to include the Department of Health and Human Services and government entities as follows:

> "Unless other specified, the following definitions shall apply to all sections of these Interrogatories and Requests for Production of Documents.
>
> 1. The terms 'you' or 'your' or 'NIH' means the defendant, National Institutes of Health, and all representatives *or other persons acting on behalf of defendant including U.S. Department of Health and Human Services.*
>
> 2. *The terms 'person' and 'persons' refer to all individuals and entities*, including corporations, division, partnerships, joint ventures, trusts, associations, *and any other business, governmental, or legal entity*, including all trade names of these." R. 000300. (Emphasis added.)

B. Tulane Is a "Person" Entitled To Remove

It also follows from this analysis that Tulane, having contracted with the Acting Director of NIH to assist NIH in the care of the animals, and having been sued in state court to preclude it from carrying out its contractually mandated functions, would also be a "person" acting under an officer of the United States entitled to remove to federal court under Section 1442(a).

The fact that Tulane could have removed, even though it did not do so, but could in the future do so if it were

necessary, is a further indication that the protection of the removal statute afforded in this case was in accordance with the statute's purpose.

VII. PRIMATE LEAGUE COMPLETELY IGNORES THE FACT THAT IT FILED A SUIT IN WHICH IT SOUGHT AND IN WHICH IT SECURED RELIEF AGAINST OFFICERS OF NIH.

Primate League, in its brief, seeks to categorize the issue before the Court as whether an agency, as distinguished from a federal officer, may remove under Section 1442(a)(1). *See, e.g.*, Pet. Brief at 8. Nowhere do they even acknowledge that in their Petition they sought relief against "agents and officers" of NIH and that they sought and secured a TRO in the District Court against NIH and its "agents, attorneys and servants." See Sections II and III of this brief.

However, Primate League does acknowledge that removal is proper with respect to actions "*involving natural persons.*" Pet. Brief at 8. This is such an action, involving as it does, a prayer by Primate League for relief against "agents and officers of NIH." Pet. App. A-32.

Petitioner Primate League also argues that removal jurisdiction should be no broader than original jurisdiction since an expansive interpretation would permit federal district courts to hear all cases in which the United States is a party, or which "implicates a cognizable federal interest." Pet. Brief at 16.

This argument misses the point. Even under a narrow interpretation of the removal statute, removal jurisdiction must be broader than original jurisdiction in order that federal officers sued for acts performed under the color of their office, on exclusively state law causes of action, may assert their immunity and other defenses in federal court. *Willingham* v. *Morgan*, 395 U.S. 402 (1969), was exclusively a state tort law cause of action which this Court held to be properly removed. Other cases have upheld the removal of state court contempt

proceedings, *North Carolina* v. *Carr*, 386 F.2d 129, 131 (4th Cir. 1967); state bar disciplinary proceedings, *Kolibash* v. *Committee of Legal Ethics of W. Va. Bar*, 872 F.2d 571, 576 (4th Cir. 1989); and state criminal proceedings, *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981). Whether or not agencies can always remove, or only when necessary to protect federal officers from litigating in state courts, is a separate question.

Only if agencies could remove in all circumstances would the federal district courts have removal jurisdiction over all the actions nominally against agencies but essentially against the United States, though such cases would still be limited by Section 1442(a)(1) to disputes involving an "act under color" of a governmental office, *cf. National Audubon Soc'y* v. *Department of Water*, 496 F. Supp. 499 (E.D. Cal. 1980), and a federal defense, *Mesa* v. *California*, 484 U.S. 121, 136 (1989). This would not expand the jurisdiction of the federal courts as would the elimination of the federal defense requirement urged by the Solicitor General in *Mesa*.

VIII. PETITIONERS HAVE CHALLENGED THE FIFTH CIRCUIT'S DECISION ON ISSUES EXCLUDED FROM THE GRANT OF CERTIORARI.

A. Certiorari Was Granted Only as to Issue One, the Removal

In their Petition for a Writ of Certiorari, petitioners sought review of the Fifth Circuit's decision with respect to three issues. The first question presented for review was the removal from state to federal court. The second was the sufficiency of the federal interest. The third related to petitioners' federal court standing including the *res judicata* effect on the jurisdictional issue to be accorded the Fourth Circuit decision. This Court granted the writ only with respect to issue one, the removal. Arguing additional issues is improper. *Irvine* v. *California*, 347 U.S. 128, 130 (1954); *Greyhound Corp.* v. *M.T. Hood Stages, Inc.*, 437 U.S. 322, 337 n.21 (1978);

Brunswick Corp. v. *Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 484 n.8 (1977).

In the Petition, Primate League argued that "[i]mplicit in the [Fourth Circuit's] ruling was a determination that Section 1442(a)(1) does not establish federal jurisdiction over any action brought against a federal agency." Pet. 11. They also argued that the principle of *res judicata* required this result. *Id.* at 12. These same arguments are repeated at pages 17-19 of their merits brief. However, certiorari was not granted with respect to the jurisdictional issue.

B. In any Event, Petitioners Misconstrue the *Res Judicata* Effect of the Fourth Circuit Opinion

Petitioners misconstrue the implications of *International Primate Protection League* v. *Institutes for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986). They argue that the refusal of the court to take jurisdiction over their state law claims against NIH implied a determination that removal of a similar action under Section 1442(a)(1), when filed in a Louisiana state court, would not be proper, and that *res judicata* precluded relitigation of the jurisdictional issue in the Louisiana action. Pet. Brief at 17-19.

But the Fourth Circuit case did not involve Section 1442 in any respect. The removal, exclusively under Section 1441(a), was based on the existence of a federal question. Since, before trial, standing was found to be lacking as to the federal claims, the state law claims were dismissed rather than remanded in accordance with the rule of *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715 (1966).

The situation is entirely different when a case is removed under Section 1442(a)(1). To protect the interest of federal officers, and the federal government, the entire case is removed and state law issues are decided in federal court even in the absence of a federal question,

notwithstanding that the action would not be within the original jurisdiction of the federal court. *Mir* v. *Frostburg*, 646 F.2d 342, 344 (9th Cir. 1980).

Consequently, there was no *res judicata* effect favorable to petitioners.

Once the removal was effected, Article III principles of standing become applicable to the state claims, as the court below held. 895 F.2d at 1061. Since Primate League was again seeking custody of the monkeys, *res judicata*, if anything, precluded relitigation of the Fourth Circuit's determination that petitioners lacked federal court standing. *Cf. Robinson* v. *National Cash Register Co.*, 808 F.2d 1119, 1124-25 (5th Cir. 1987).

C. The Sufficiency of the Federal Interest Is Not Within the Scope of the Grant of Certiorari with Respect to Removal, Issue Number One

In their Petition for Writ of Certiorari in issue number two, Primate League argued that the federal interest had not been sufficiently established. Pet. at i. In Section E of their merits brief, Primate League again argues the sufficiency of the federal interest. Pet. Brief at 19-23. Since the grant of certiorari was limited to the removal, issue number one, the federal interest question should not be considered.

D. Primate League Misstates the Record with Respect to the Detailed Documentation of the Federal Interest That Was Before the District Court and the Court of Appeals

Petitioners quote from the transcript of a May 3, 1989 court hearing for the proposition that the record contained no documentation of any federal interest in the Silver Spring Monkeys. Pet. Brief at 21. They charge that NIH "refused to document its interest." *Id.* From this faulty premise they contend that "[o]n appeal, then, the Fifth Circuit had nothing before it that would have established NIH's interest in the case." *Id.* at 22.

However, the following declarations and affidavits bearing on the federal interest were filed in the District Court:

1. ***Declaration of Dr. William F. Raub, of NIH, IBR App. C***

This declaration sets forth that after the termination of the Maryland criminal proceedings "NIH continued to care for the animals." The declaration also recites NIH's transfer of the monkeys to Tulane's Delta Finance Center, and attaches as Exhibit B the contract between NIH and Tulane for the care of the monkeys by the Delta Center. The costs incurred by both IBR and NIH are set forth.

2. ***Second Declaration of Dr. William F. Raub, R. 102-5***

In his Second Declaration, Dr. Raub expanded on NIH's custodial interest in the monkeys dating back to October 1981. R. 102-3. He also reviewed NIH's financial interest in the monkeys. R. 103-4. In describing NIH's research in the monkeys he explained,

> "NIH is a component of the United States Department of Health and Human Services. It has an annual budget in excess of seven billion dollars which is expended, pursuant to statutory authority, for the conduct of biomedical research at private and public institutions throughout the world. In furtherance of its statutory research mission, NIH has an interest in the important knowledge that can be gained from these unique animals. This knowledge, which can be gained through humane, non-painful procedures conducted as part of and following the euthanasia procedure involving deep surgical anesthesia, is important as it may lead to substantial improvements in rehabilitation therapy for those who have suffered brain or spinal cord damage. The animals are a unique resource for such research because of the length of time since they were deafferented and because of recent developments in scientific knowledge and methodology. Such research would also fulfill the research purpose for which the animals were obtained by IBR with funds from a grant awarded by NIH and would ensure that the animals had not been subjected to the experimental deafferentation and its consequences in vain. In pursuing this research interest, NIH is acting in accordance with a recommendation made in March 1988, by a panel of independent experts in veterinary care, the behavior of non-human primates and neurology." R. 104-5.

3. ***The Affidavit of Dr. Peter Gerone, NIH App. A***

Dr. Peter Gerone, in his affidavit, describes as follows Tulane's role:

> "In accepting the Silver Spring monkeys in June of 1986, on behalf of Tulane University, it was my understanding that we would aid the National Institutes of Health (NIH) in its role as the custodian of the monkeys which are legally owned by the Institute for Behavioral Resources, Inc. (IBR) of Washington, D.C.
>
> "Although my staff and I have been involved in making evaluations and recommendations regarding health and well-being of the Silver Spring monkeys, the final decisions regarding clinical care have been made and will continue to be made by the owners, IBR, and the primary custodians, NIH."

4. ***The Declaration of Dr. Joseph V. Brady, NIH App. B***

Dr. Joseph V. Brady, President and Chairman of the Board of IBR, explains that "the NIH custody of the animals has been maintained with the consent and cooperation of the IBR, although we have never signed a document formalizing the custody arrangement." The declaration contains the following statement concerning the research to be conducted in connection with the planned euthanasia:

> "We were consulted by the NIH regarding the proposed euthanasia of three of the animals and we fully concur with the NIH decision. We strongly support the research that would be conducted in conjunction with the euthanasia. We believe this research will benefit rehabilitation therapy, that it will fulfill the function for which the animals were obtained by IBR and will ensure that their long period of maintenance in a deafferented condition has not been in vain."

These affidavits and declarations were before the District Court and were part of the record transmitted to the Fifth Circuit. The federal interest was more than adequately documented.

CONCLUSION

For the reasons stated above, the opinion below should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, ET AL., PETITIONERS

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL INSTITUTES OF HEALTH

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QUESTION PRESENTED

Whether federal agencies may remove state court actions to the federal courts pursuant to 28 U.S.C. 1442(a)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-89

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, ET AL., PETITIONERS

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL INSTITUTES OF HEALTH

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 895 F.2d 1056.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1990 (Pet. App. A1-A15). A petition for rehearing was denied on April 13, 1990 (Pet. App. A24-A25). The petition for a writ of certiorari was filed on July 12, 1990, and was granted on November 26, 1990, limited to the question whether 28 U.S.C. 1442(a) permits a federal agency to remove

a civil action from state court to federal court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 1442(a) provides, in pertinent part:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of revenue.

STATEMENT

This case concerns the care and custody of macaque monkeys that were the subject of experiments to determine whether the monkeys recovered use of limbs after nerves to the limbs were severed. The experiments were conducted during 1981 by a private research facility—then called the "Institute for Behavioral Research," later the "Institutes for Behavior Resources" (IBR)—under funding from the National Institutes of Health (NIH). The purpose of the experiments was to gain information that could be used in rehabilitating human patients with neurological damage. Pet. App. A2.

In September 1981, Maryland police officers executed a warrant at the facility where the monkeys were then being kept and seized the monkeys, acting upon allegations that the monkeys were being mistreated. Pet. App. A3. Shortly thereafter, pursuant

to a court order, NIH assumed custody of the monkeys pending resolution of a criminal complaint against Dr. Edward Taub, chief of IBR's Behavioral Biology Center. *Id.* at A3-A4; IBR App. 6a-7a.[1] After that order expired, NIH continued to act as the monkeys' principal custodian with the consent and cooperation of IBR, the monkeys' owner. Pet. App. A4; IBR App. 7a. Throughout this period, NIH at its own expense housed and fed the monkeys and provided them with routine veterinary care. IBR App. 7a, 8a; NIH App. 3a.

In December 1981, petitioners and other plaintiffs filed an action against IBR and NIH, among others, in the Circuit Court for Montgomery County, Maryland. The complaint alleged that the defendants had violated Maryland animal cruelty laws and the federal Animal Welfare Act, 7 U.S.C. 2131 *et seq.*, and asked the court to grant plaintiffs custody of the monkeys. See *International Primate Protection League* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934, 937-938 (4th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). NIH removed the case to federal court without opposition, and then IBR moved to dismiss the complaint for lack of standing. 799 F.2d at 938, 940. The district court granted the motion to dismiss on grounds of standing, and the Fourth Circuit affirmed. *Id.* at 937.

In June 1986, while the Fourth Circuit case was pending, NIH transferred the monkeys to Tulane University's Delta Regional Primate Research Center

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[1] "IBR App." refers to the appendix to the brief in opposition to certiorari filed by respondent Institutes for Behavior Resources. "NIH App." refers to the appendix to the brief in opposition to certiorari filed by respondent National Institutes of Health.

in Covington, Louisiana (Delta Center). Under NIH's letter of agreement with the University, the Delta Center was to "act[] strictly as an aide to NIH in its role as . . . custodian [for the monkeys]." IBR App. 8a; NIH App. 1a. NIH paid the Delta Center for housing the monkeys and was reimbursed by IBR for a portion of these costs. IBR App. 8a; NIH App. 3a.

In December 1988, NIH announced plans to euthanize three of the monkeys pursuant to the recommendation of a panel of independent experts. As part of the euthanasia procedure, which would involve deep surgical anaesthesia, NIH planned to conduct humane, nonpainful procedures by which it hoped to gain knowledge that could lead to improvements in rehabilitation therapy for persons who have suffered brain or spinal cord damage, strokes, or similar injuries. Pet. App. A4.

Before NIH could carry out the euthanasia, petitioners sued NIH, IBR, and the Administrators of the Tulane Educational Fund (Tulane) in the Civil District Court for the Parish of Orleans in Louisiana. Pet. App. A30-A31. Petitioners sought an order enjoining the enthanasia and granting custody of the monkeys to petitioners or members of the U.S. Congress. *Id.* at A38-A39. After the state court granted petitioners' motion for a temporary injunction barring euthanasia of the three monkeys (IBR App. 1a), NIH removed the case to the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. 1442(a)(1). J.A. 1, 16, 17.[2]

[2] Petitioners sought injunctive relief against the "agents and officers of NIH, IBR, and the administrators of the Tulane Education Fund." Pet. App. A30-A32. The state court's temporary restraining order named only the administrators, "their agents, attorneys and servants" (IBR App. A), because at the time of issuance the other defendants had not been served.

Petitioners moved to remand the case, arguing that the case had been improperly removed. J.A. 1-2. NIH filed motions to dismiss the case on the grounds that petitioners lacked Article III standing and that their suit was barred by res judicata, the Supremacy Clause, and sovereign immunity. The district court denied both NIH's and petitioners' motions. Pet. App. A17, A18.

Pending consideration of those motions, the district court issued a temporary restraining order "enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction" of the monkeys. Pet. App. A16. The district court later refused to vacate its order when NIH objected that the order had exceeded the twenty-day limit on temporary restraining orders imposed by Federal Rule of Civil Procedure 65(b). Pet. App. A4.

NIH and Tulane appealed the district court's order to the United States Court of Appeals for the Fifth Circuit, arguing that the order had become the functional equivalent of a preliminary injunction appealable under 28 U.S.C. 1292(a)(1). Pet. App. A4. On appeal, NIH and Tulane argued that petitioners had not demonstrated a likelihood of success warranting preliminary injunctive relief because they (1) lacked Article III standing, (2) had failed to state a cause of action under Louisiana law, and (3) were barred by the Supremacy Clause from securing injunctive relief under state law against NIH's planned research activities. *Id.* at A5.

The court of appeals agreed that petitioners lacked Article III standing and accordingly did not address respondents' other arguments. Pet. App. A5-A11, A15.[3] The court rejected petitioners' argument that the case was improperly removed. Relying on Fifth Circuit precedent, the court held that federal agencies are entitled to remove state court actions pursuant to 28 U.S.C. 1442(a)(1). Pet. App. A12-A13 (citing *Smith* v. *City of Picayune*, 795 F.2d 482 (1986)). The court further held that NIH had a sufficient interest in this case to invoke that provision. Pet. App. A13-A15.

A petition for rehearing was denied, Pet. App. A24-A25, and petitioners filed a petition for certiorari presenting three questions: whether the Fifth Circuit properly ruled that (1) an agency may remove an action under 28 U.S.C. 1442, (2) NIH had a sufficient interest in the action to remove it, and (3) petitioners lacked standing. This Court granted certiorari limited to the first question. 111 S. Ct. 507 (1990).

SUMMARY OF ARGUMENT[4]

1. a. Section 1442(a)(1) authorizes removal by "any officer of the United States or any agency thereof." That language may reasonably be read to

[3] The appendix to the petition omits several lines from the relevant portion of the court of appeals' decision. Compare Pet. App. A8 with 895 F.2d at 1060 (text accompanying note 4).

[4] As an initial matter, it is not clear that the Court can properly decide the only question on which it granted certiorari. The court of appeals below ruled—correctly, in our view—that petitioners lacked Article III standing to maintain their suit. Pet. App. A15 ("As federal court jurisdiction is limited by the constitution, the plaintiffs' failure to allege injury sufficient to satisfy Article III standing requirements is fatal to their suit."); see *id.* at A5-A11. Although petitioners sought review of that question, see Pet. i, this Court limited its grant of certiorari to the court of appeals' ruling on removal. 111 S. Ct. 507 (1990). In the present posture of the case, therefore, petitioners lack Article III standing. If they lack Article III standing, then they lack Article III standing to litigate further before this or any other federal court, except to seek review of the standing ruling and until they have secured such review. See *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *United States* v. *Corrick*, 298 U.S. 435, 440 (1936). In particular, given that petitioners lack Article III standing, they have no standing to litigate and secure a decision from this Court on the propriety of removal, since this Court must satisfy itself that the requirements of Article III—including standing—have been met. See *Bender*, 475 U.S. at 541.

This is not an academic quibble. One purpose of standing is to ensure the concrete adverseness necessary to proper presentation of issues, see *Bender*, 475 U.S. at 542. Yet here the Court would be resolving the removal question in a context in which the court below specifically found the injury in fact necessary to such adverseness to be lacking, Pet. App. A5-A11; see *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 486 (1982)—a finding this Court has declined to review. Given the unreviewed decision on standing by the court below, any decision by this Court on removal will be rendered in the context of a case that is outside the bounds of Article III. While this Court has jurisdiction to decide that cases are not properly within Article III, it is difficult to see how the Court can accept the proposition that a case before it is not within Article III—the effect of leaving the standing decision below unreviewed—and nonetheless go on to issue an opinion on some other ground.

authorize removal by any agency of the United States as well as by any officer of the United States. Contrary to petitioners' contention, neither the word "persons" nor the word "him" used elsewhere in the

provision plainly indicates an intention to limit those entitled to remove to natural persons.

Even if this Court were to read the opening clause of Section 1442(a)(1) more narrowly—as authorizing removal only by an officer of the United States or by an officer of an agency of the United States—the present action would still be removable under a natural reading of the second clause of Section 1442(a)(1). That clause goes on to authorize removal by a "person acting under" the federal officer. NIH is a "person acting under" such an officer, and therefore properly invoked this provision in removing the action brought against it in state court.

Moreover, interpreting Section 1442(a)(1) to authorize removal by federal agencies accords with the overall structure of the statute. Section 1442 was designed to afford a comprehensive right of removal in cases challenging the conduct of the federal government. This Court has accordingly recognized that Section 1442(a)(1) embodies Congress's decision that "federal officers, *and indeed the federal government itself*, require the protection of a federal forum." *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969) (emphasis added). Because the federal government acts largely through its agencies, Section 1442(a)(1) should be construed to authorize them to remove state court actions to the federal courts.

b. The legislative history, though not decisive, supports our construction of Section 1442(a)(1). Although earlier removal provisions were drafted with reference to federal officers, this merely reflects the fact that, at the time of enactment, federal officers, and not federal agencies, were being sued. The significant aspect of the history of these various removal provisions is that each was founded on the need to "maintain the supremacy of the laws of the

United States." *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932). In contrast to earlier provisions, Section 1442 was enacted at a time when numerous federal agencies could be sued in state courts. The extension of the right of removal to federal agencies in the language of Section 1442(a)(1) reflected a logical response to this development.

c. Construing Section 1442(a)(1) to authorize removal by federal agencies is necessary to avoid absurd results that would flow from a contrary interpretation. In this case, for example, the officers of NIH would be prevented from removing this case even though they were expressly subject to the injunctive relief sought and obtained by petitioners. Congress could not have intended the availability of a federal forum to turn on petitioners' selection of NIH as a defendant, rather than its officers, particularly when petitioners sought relief against the officers. Petitioners have suggested no plausible reason why Congress would have wanted to afford a right of removal to federal officers, while denying such a right to federal agencies. Their particular brand of literalism ultimately makes no sense.

d. As this case also shows, in many contexts there is no meaningful distinction between actions by an agency and actions by an officer of the agency. This Court has recognized as much on at least two occasions. Both cases, like this one, concern the circumstances under which federal agencies can be sued. Similarly, Congress in several statutes has waived sovereign immunity to certain actions brought in state court and expressly permitted such actions to name either agencies or officers as defendants. Congress certainly did not intend the removal of these suits to turn on the fortuity of which entity was named.

2. Petitioners' arguments that (1) the issue of removal in this case is *res judicata* and (2) NIH lacked a sufficient interest in this case to remove it are beyond the scope of this Court's grant of certiorari and in any event are without merit. The removal issue under Section 1442(a)(1) was neither raised nor decided in the Fourth Circuit decision on which petitioners' *res judicata* argument relies. Their insufficient-interest argument is defeated by their own decision to name NIH as a defendant and to base their entire complaint on alleged misconduct by NIH. In addition, both the record in this case and NIH's statutory mandate show that NIH has a vital interest in this case.

ARGUMENT

I. FEDERAL AGENCIES MAY REMOVE STATE COURT ACTIONS TO FEDERAL COURT PURSUANT TO 28 U.S.C. 1442(a)(1)

A. The Language of Section 1442(a)(1) May Fairly Be Read to Authorize Removal by Federal Agencies

NIH invoked Section 1442(a)(1) to remove to federal court the suit that petitioners brought against it in Louisiana state court challenging NIH's care and custody of a group of macaque monkeys. Section 1442 provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *.

The question is whether this provision may be invoked by federal agencies.

We believe that a natural reading of the statutory language leads to the conclusion that Section 1442(a)(1) may be relied upon by federal agencies as well as federal officers. There are two routes to this destination. The first route relies on the opening clause of Section 1442(a)(1), which authorizes removal by "[a]ny officer of the United States *or any agency thereof.*" 28 U.S.C. 1442(a)(1) (emphasis added). NIH is an agency of the United States, see 42 U.S.C. 202, 281(a); 28 U.S.C. 451, and therefore may remove an action brought against it in state court. See, *e.g.*, *IMFC Professional Servs. of Florida, Inc.* v. *Latin American Home Health, Inc.*, 676 F.2d 152, 156 (5th Cir. 1982).

We fully recognize that this is by no means the only possible reading of the opening clause. The phrase "or any agency thereof" may alternatively be read as part of the prepositional phrase that precedes it, so that the clause authorizes removal by an "officer of the United States" or by an "officer of * * * any agency thereof." See, *e.g.*, *Lovell Mfg.* v. *Export-Import Bank*, 843 F.2d 725, 733 (3d Cir. 1988). For the reasons set forth below, we believe that the Fifth Circuit correctly resolved this ambiguity in favor of the former reading, which is consistent with the statute's purpose of affording "the federal government * * * the protection of a federal forum." *Willingham*, 395 U.S. at 407.

If this Court disagrees with that interpretation, a natural reading of the second clause of Section 1442(a)(1) still permits NIH to remove this action. By its terms, the second clause authorizes removal by a "person acting under" an officer of the United States. The activities of NIH are subject to the direction and

control of the Director of NIH, an officer of the United States, see 42 U.S.C. 282(a), who in turn answers to the Secretary of Health and Human Services (*ibid.*) NIH is thus a "person acting under" a federal officer, and accordingly is expressly authorized to remove an action under Section 1442(a)(1).

Since every executive agency acts under *some* officer of the United States, this reading of Section 1442(a)(1) would lead to the general conclusion that such agencies—as well as their officers—may rely on the statute to remove actions to federal court. This result does not prove too much, but instead proves just enough. It is the result suggested by the purpose of the statute, see pp. 16-21, *infra*; since it also rests on a natural reading of the statutory text, that reading should be adopted by this Court.

Contrary to petitioners' contention (Pet. Br. 9-10), Congress's use of the word "persons" to refer to those entitled to remove does not indicate that only *natural* persons may invoke Section 1442(a)(1). In fact, the general rule is that the meaning of "person" is not confined to natural persons. See 1 U.S.C. 1. The precise scope of the term depends on its context: "The word 'person' * * * is not a term of art with a fixed meaning wherever it is used." *Pfizer Inc.* v. *India*, 434 U.S. 308, 315 (1978).[5] Thus, the Court

[5] On some occasions, the Court has said "in common usage, the term 'person' does not include the sovereign [and] statutes employing the phrase are ordinarily construed to exclude it." *United States* v. *Cooper Corp.*, 312 U.S. 600, 604 (1941); accord *United States* v. *Mine Workers*, 330 U.S. 258, 275 (1947). In so stating, however, the Court has emphasized that there is "no hard and fast rule of exclusion," *Cooper*, 312 U.S. at 604-605. In addition, the Court has more recently indicated that the rule normally should apply only "where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage," *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667 (1979), and that "much depends on the context" (*ibid.*). Accord 3 C. Sands, *Sutherland Statutes and Statutory Construction* § 62.02, at 72 (4th ed. 1974). The rule thus should not be applied in interpreting Section 1442(a)(1), which does not impose a burden or limitation but instead was enacted to afford the federal government the benefit of a federal forum for challenges to actions "under color of * * * office."

has interpreted the word "person" in the United States Code to include governmental agencies. See, *e.g.*, *Jefferson County Pharmaceutical Ass'n Inc.* v. *Abbott Laboratories*, 460 U.S. 150, 154-170 (1983) (purchases by state public corporation and other state instrumentalities subject to Robinson-Patman Anti-Discrimination Act, 15 U.S.C. 13(a) and (f)); see also *Estate of Wycoff* v. *Commissioner*, 506 F.2d 1144, 1151 (10th Cir. 1974) (United States a "person" for purposes of federal tax code provision); *Ruhl* v. *Railroad Retirement Bd.*, 342 F.2d 662, 666 (7th Cir.) (Department of Army and other "governmental bodies" are "person[s]" under Railroad Retirement Act of 1937, 45 U.S.C. 228b(a)), cert. denied, 382 U.S. 836 (1965).[6] In other settings, the

[6] See also *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978) (municipality is a "person" under 42 U.S.C. 1983); *Georgia* v. *Evans*, 316 U.S. 159, 161 (1942) (holding that State was a "person" entitled to sue under Section 7 of Sherman Act and rejecting argument that "the word 'person' * * * could not include a governmental body"); *Ohio* v. *Helvering*, 292 U.S. 360, 370-371 (1934) (state agencies are "person[s]" under federal liquor tax laws); *Stanley* v. *Schwalby*, 147 U.S. 508, 517 (1893) (United States is a "person" under state laws, even if otherwise immune from their operation); *Employment Dev. Dep't* v. *United States Postal Serv.*, 698 F.2d 1029, 1032-1033 (9th Cir. 1983) (Postal Service a "person" under state law provision); cf. *United States*

Court has reached a contrary conclusion. See, *e.g.*, *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989). The point is this: the use of the word "persons" in Section 1442(a) does not, as petitioners beguilingly suggest, inexorably limit the scope of the statute to individuals.[7]

Indeed, the remainder of Section 1442(a) strongly suggests that the "persons" who may remove an action under that Section are not limited to natural persons. Included among the listed "persons" who may remove an action under Section 1442(a) is "[a] property holder whose title is derived from [an officer of the United States]." 28 U.S.C. 1442(a)(2). Such property holders are obviously not limited to natural persons, but include other entities that might hold property, such as corporations, partnerships, and trusts. The same word "persons" in Section 1442(a) surely cannot mean one thing when read with subsection 1442(a)(2) (where it plainly includes non-natural persons) and another when read with subsection 1442(a)(1).

Petitioners similarly err in relying on the presence in Section 1442(a)(1) of the pronoun "him." See

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v. *Yellow Cab Co.*, 340 U.S. 543, 553-556 (1951) (in Federal Tort Claims Act actions, United States subject to being impleaded under Fed. R. Civ. P. 14, providing for service of process upon a "person" not a party to main action).

[7] That Congress deemed it necessary in the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, expressly to exclude "an agency" from the definition of "person" obviously does not indicate, as petitioners would have it, that Congress drew a sharp "distinction between 'persons' and 'agencies'" elsewhere in the Code (Pet. Br. 9). On the contrary, it seems more reasonable to infer that Congress believed that "person" otherwise would be construed to include an agency, in the absence of Congress's expression of a contrary intent.

Pet. Br. 10.[8] The masculine form of the pronoun is commonly used to refer to entities denominated elsewhere in a statute as "persons." For example, Section 4(a) of the Clayton Act authorizes private actions by "any person who shall be injured in *his* business or property" and provides for recovery of "threefold the damages by *him* sustained," 15 U.S.C. 15(a) (emphasis added).[9] Any argument that this wording limits those entitled to sue to natural persons is defeated by Section 1(a) of the Act, which defines "person" to include corporations and associations, 15 U.S.C. 12(a), and by this Court's holding in *Pfizer*, *supra*, that the term "person" also includes a foreign government. See also *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396-397 (1906).

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[8] Petitioners' argument on this score only applies to our reading of the first clause of Section 1442(a)(1) as affording agencies a right of removal. Even if petitioners are correct in the significance they ascribe to the use of the pronoun "him," an agency may still remove an action under Section 1442(a)(1) as a "person acting under" an officer of the United States. Only if petitioners are correct both in their limitation of "persons" *and* "him" to natural persons can they prevail.

[9] See also, *e.g.*, Robinson-Patman Anti-Discrimination Act, 15 U.S.C. 13(b) ("nothing herein contained shall prevent a *seller* rebutting the prima-facie case thus made by showing that *his* lower price or the furnishing of services or facilities * * * was made in good faith") (emphasis added); Federal Water Pollution Control Act, 33 U.S.C. 1321(b)(5) (requiring "[a]ny *person* in control of a vessel or of an onshore facility or an offshore facility" to notify government of oil spill "as soon as *he* has knowledge of" spill) (emphasis added); 33 U.S.C. 1321(a)(7) (defining "person" to include non-natural entities).

Petitioners' final argument in support of the "plainness" of their reading of Section 1442(a)(1) is that Congress could have drafted the provision more clearly to permit removal by federal agencies. Pet. Br. 9. This argument is self-defeating. Congress likewise could have drafted the provision more clearly to prohibit such removal, for example, by using the term "individuals" instead of "persons" to describe those entitled to removal under the provision. Petitioners' argument that Congress could have drafted the statute more clearly merely confirms the ambiguity of the language that Congress did enact. Cf. *Young* v. *Community Nutrition Institute*, 476 U.S. 974, 980-981 (1986).

Petitioners' arguments as to the purported "plainness" of Section 1442(a)(1) suffer from a more fundamental deficiency. While we certainly agree that plain language should be given its plain meaning, the proper construction of Section 1442(a)(1) is not readily apparent from the text alone. In such a case, the statute must be read as a whole and in light of its purpose. *E.g.*, *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). In the context of this very statute, the Court has specifically warned that the statutory purpose "should not be frustrated by a narrow, grudging interpretation of section 1442(a)(1)." *Willingham*, 395 U.S. at 407. See also *Symes*, 286 U.S. at 517 (Section 1442 should be "liberally construed to give full effect to the purposes for which it was enacted"). Under these principles, Section 1442(a)(1) should be interpreted—as a natural reading of its text permits—to authorize removal by federal agencies.

Despite its title, the scope of Section 1442 clearly is not limited to actions against federal officers.[10] Section 1442 expressly allows former officers and persons who hold title under federal officers to invoke the provision. 28 U.S.C. 1442(b), 1442(a)(2). Beyond this, subsections (a)(1), (a)(3), and (a)(4) broadly authorize removal of state court suits challenging actions of the Executive, the Judiciary, and the Legislature. The comprehensive reach of Section 1442—covering all three branches, former officers, and persons acting under officers—strongly suggests that Congress intended to allow removal of the broad array of governmental actions taken under color of office.[11]

That intention has guided this Court's decisions construing Section 1442 and its statutory predecessors. The Court's definitive description of the pur-

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[10] Here, as is often the case, the statutory title is not a reliable guide to interpretation. See, *e.g.*, *United States* v. *Minker*, 350 U.S. 179, 185 (1956); *Brotherhood of R.R. Trainmen* v. *Baltimore & O. R.R.*, 331 U.S. 519, 528-529 (1947); *United States* v. *Union Pac. R.R.*, 91 U.S. 72, 82 (1875).

[11] Considering only the structure of Section 1442(a), it might be thought that subsection (a)(1) concerns solely the executive branch, since subsections (a)(3) and (a)(4) address the judicial and legislative branches, respectively. From the history of Section 1442, however, it is clear that "subsections (2)-(4) of § 1442(a) are largely the 'residue' of the pre-1948, more limited removal statutes now entirely encompassed by the general removal provision of the first clause of subsection (1)." *Mesa* v. *California*, 489 U.S. 121, 134 (1989). The retention of earlier, essentially redundant provisions in subsections (a)(2)-(a)(4) further suggests Congress's intention in enacting Section 1442 to afford a comprehensive right of removal with respect to state suits challenging all governmental actions.

pose of such provisions remains that set forth in *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880):

> [The government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State courts,—the operation of the general government may at any time be arrested at the will of one of its members.

A century later, the Court relied on this same passage in reemphasizing "the need to safeguard the exercise of legitimate federal authority." *Arizona* v. *Manypenny*, 451 U.S. 232, 241 n.16 (1981). See also *Mesa* v. *California*, 489 U.S. 121, 126 (1989) (quoting *Tennessee* v. *Davis*, *supra*).

Section 1442(a)(1) should not, consistent with the comprehensive scope of Section 1442 as a whole, be read to exclude removal of actions against federal agencies. Agencies, as they are defined for purposes of title 28, constitute a significant portion of the government and virtually the entire executive branch.[12] Thus, most "officers of the United States"

[12] 28 U.S.C. 451 provides in relevant part:

> As used in this title:
>
> * * * * *
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

within the meaning of Section 1442(a)(1) are also "officers of an[] agency."[13] Since an agency can act only through its members, every action of an agency officer under color of office is in some sense "agency action," and therefore arguably affords the basis for a suit against the agency. Interpreting Section 1442(a)(1) to preclude removal of state court challenges to such actions would defeat the obvious purpose of the provision.

Petitioners nonetheless argue (Pet. Br. 16-17) that reading Section 1442(a)(1) to permit removal by federal agencies would "broaden removal jurisdiction far beyond original jurisdiction." This is both in-

[13] Petitioners read Section 1442(a)(1) to permit removal by "an officer of the United States *or* an officer of an agency of the United States" (Pet. Br. 9). Nowhere, however, do petitioners explain the distinction they purport to discern between officers of the United States and officers of agencies of the United States. We are not aware of any statute or case law that draws such a distinction. By the same token, numerous statutes addressing suits by or against the Executive Branch draw no such distinction. For example, 28 U.S.C. 1345 grants original jurisdiction to district courts of actions "commenced by the United States, or by any agency or officer thereof." Other provisions throughout the U.S. Code employ the same or similar language and do not distinguish officers of the United States from officers of agencies. These provisions suggest that, at least for purposes of Section 1442(a)(1), all officers of agencies of the United States are officers of the United States. Petitioners' interpretation of Section 1442(a)(1) thus appears to render the phrase "any agency thereof" superfluous, in violation of a cardinal principle of statutory construction. 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 46.06 (4th ed. 1974).

correct and irrelevant. It is incorrect because agencies, like officers, may invoke Section 1442(a)(1) only if they can allege a federal defense to the action sought to be removed. *Mesa*, 489 U.S. at 125-134. This requirement ensures that cases removed by agencies will normally require resolution of a federal issue, thereby fulfilling the purpose for which the right to removal was conferred. Moreover, petitioners' assumption that the scope of removal jurisdiction must be coextensive with original jurisdiction is belied by the existence of Section 1442. Under 28 U.S.C. 1441, federal courts already have removal jurisdiction over any suit as to which they could assert original jurisdiction. Section 1442 "serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal [under Section 1441] even if a federal defense were alleged." *Mesa*, 489 U.S. at 136.[14]

Similarly beside the point is petitioners' argument (Pet. Br. 17-19) that "[t]his case presents issues of state law that are within the peculiar province of the Louisiana state courts." Every case removed under Section 1442 is based on state law; otherwise, it would have been removable under Section 1441. This is as true for cases removed by federal officers as it is for those removed by federal agencies. Petitioners' argument thus provides no basis for interpreting Section 1442(a)(1) to preclude removal by

[14] See also *Willingham*, 395 U.S. at 406 (Section 1442(a)(1) provides for removal of a suit involving "any act 'under color' of federal office, *regardless of whether the suit could originally have been brought in federal court*") (emphasis added); see also 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3727, at 459 (1981) (removal statute "may be exercised even though the action might not have been brought initially in a federal court."); 1A *Moore's Federal Practice* ¶ 0.164, at 385 (2d ed. 1986).

agencies. That was made clear by this Court long ago: "Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of [removal] jurisdiction." *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868) (quoted in *Mesa*, 489 U.S. at 129).

B. Interpreting Section 1442(a)(1) to Authorize Removal by Federal Agencies Is Consistent with Legislative History

The current version of Section 1442 was enacted in 1948 as part of a comprehensive revision and codification of the Judicial Code. *Willingham*, 395 U.S. at 406. As the Revision Notes to Section 1442 indicate, subsection (a)(1) derived from Section 76 of the prior Code, 28 U.S.C. 76 (1940), which was "limited to revenue officers engaged in the enforcement of the criminal or revenue laws." 28 U.S.C. 1442 Revision Notes. The earlier provision, according to the Notes, was "extended to apply to all officers and employees of the United States or any agency thereof." *Ibid.* This description, which represents the only legislative history that specifically addresses the scope of Section 1442(a)(1), suffers from the same ambiguity as the statutory language to which it refers.[15] The historical context in which

[15] Contemporaneous commentary on the 1948 codification suggests that Section 1442(a)(1) was understood to authorize removal by federal agencies. See H. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 220-221 (1948) (arguing that federal courts should have original, in addition to removal, jurisdiction over "actions against agencies or officers of the United States based on a claim of illegality in conduct under color of

Section 1442(a) was enacted, however, supports interpreting that provision to allow removal by federal agencies.

Section 1442(a) is the latest of a series of removal provisions applicable to suits challenging the conduct of the federal government. In 1815, Congress enacted a temporary measure to enforce a trade embargo with England over the opposition of the New England states.[16] This provision was followed by passage of the Force Act of 1833 in response to South Carolina's attempt to thwart enforcement of federal revenue laws.[17] The Force Act was gradually expanded during the Civil War, Reconstruction, and on into the twentieth century to authorize removal by a broadening range of federal officials. *Willingham*, 395 U.S. at 404-405.[18]

their office"). See also H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 1147-1150 (1953) (discussing Section 1442(a)(1) as designed "for the protection of federal officers and agencies and persons acting under them").

[16] The Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198, "allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done 'under color' of [office]." *Willingham*, 395 U.S. at 405.

[17] The Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633, provided for removal of any suit or prosecution commenced against "any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States or under colour thereof."

[18] Congress passed another temporary measure during the Civil War, allowing "any officer, civil or military" to remove any suit for any "wrongs done or committed * * * during the present rebellion" under color of federal law. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 756; see *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247 (1868). This statute expired

In drafting these removal provisions, Congress referred to federal officers because they, and not federal agencies, were the ones being sued in state courts. Throughout this period, state court suits against federal officers were commonplace, while suits against government agencies were rare.[19] As a formal matter, these suits often named the officers in their personal capacity, even though they typically complained of

shortly after the Civil War, but the Force Bill continued in effect, and was expanded to apply to collectors of the internal revenue (Act of Mar. 7, 1864, ch. 20, § 9, 13 Stat. 17), to persons acting under color of the Elective Franchise Act (Act of Feb. 28, 1871, ch. 99, § 13, 16 Stat. 437-438 (repealed 1894)), to officers of either House of Congress (Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 401), to court officers (Act of Aug. 23, 1916, ch. 399, 39 Stat. 532), to soldiers in the military service (Act of Aug. 29, 1916, ch. 418, § 3, Art. 117, 39 Stat. 669), to prohibition officers (National Prohibition Act of 1919, tit. II, ch. 85, § 28, 41 Stat. 316 (repealed 1935)), and finally to "[a]ny officer of the United States or any agency thereof, or person acting under him" (Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 938). See generally F. Frankfurter & J. Landis, *The Business of the Supreme Court* 11 n.22, 61-69 (1928).

[19] See, *e.g.*, *Olney* v. *Arnold*, 3 U.S. (3 Dall.) 308 (1796); *Otis* v. *Bacon*, 11 U.S. (7 Cranch) 589 (1813); *Crowell* v. *McFadon*, 12 U.S. (8 Cranch) 94 (1814); *Meigs* v. *M'Clung's Lessee*, 13 U.S. (9 Cranch) 11 (1815); *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137 (1836). See generally *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. 80-81 (1941); Note, *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 840-842 (1957) (discussing actions against government corporations); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1943, 1943 & n.296, 1948 n.329 (1983) (discussing actions against government officers).

conduct carried out under color of office. See, *e.g.*, *United States* v. *Lee*, 106 U.S. 196, 210 (1882); cf. *Stanley* v. *Schwalby*, 147 U.S. 508, 512, 518 (1893). The purpose of this practice was to circumvent the doctrine of sovereign immunity, which generally barred suits that named the United States or one of its instrumentalities as a defendant.[20]

By 1948, when the current version of Section 1442 was enacted, the legal landscape had changed. Opportunities now existed to sue federal agencies in state courts, since, by this time, numerous federal agencies and federally controlled corporations were empowered "to sue and be sued," often in either federal or state court.[21] Congress's use of "sue and

[20] See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. 382, 387-389 (1939); *Kendall* v. *United States*, 37 U.S. 524, 610-611 (1838); *Bank of the United States* v. *Planters Bank*, 22 U.S. (9 Wheat.) 904 (1824); cf. *Olson* v. *United States Spruce Prod. Co.*, 267 U.S. 162, 466-467 (1929); *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922). Suits naming individual officers could still be defeated if the United States or an official who was not named was determined to be an indispensable party. See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. at 386-388; *Webster* v. *Fall*, 266 U.S. 507, 510 (1929); *Guerich* v. *Rutter*, 265 U.S. 388, 391-392 (1924); *Warner Valley Stock Co.* v. *Smith*, 165 U.S. 28, 34 (1897).

[21] See, *e.g.*, 52 Stat. 72, 73 (1938) (Federal Crop Insurance Corporation); 50 Stat. 888, 890 (1937) (U.S. Housing Authority); 50 Stat. 697, 698 (Southeastern University); 50 Stat. 5, 7 (1937) (Farmers Home Corporation); 49 Stat. 684, 722 (1935) (Federal Housing Administrator); 48 Stat. 1246, 1256 (FSLIC); 48 Stat. 58, 60 (1933) (Tennessee Valley Authority); 47 Stat. 725, 735 (1932) (Federal Home Loan Bank); 47 Stat. 5, 6 (1932) (Reconstruction Finance Corporation). See generally *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. 7-11 (1941); 1 K. Davis, *Administrative Law Treatise* §§ 1.5, 1.6 (2d ed. 1978).

be sued" provisions, in turn, contributed to a judicial "climate of opinion which * * * brought governmental immunity from suit into disfavor." *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 391 (1939); see also, *e.g.*, *Reconstruction Fin. Corp.* v. *J.G. Menihan & Co.*, 312 U.S. 81 (1941); *Federal Housing Admin.* v. *Burr*, 309 U.S. 242, 246-250 (1940); *Federal Land Bank* v. *Priddy*, 295 U.S. 229, 235 (1935).[22]

Against this backdrop, it is not surprising that the scope of Section 1442(a)(1) was expanded beyond officers of the United States to include "any agency thereof"—a logical response to the increased exposure of federal agencies to state court suits. Such an expansion was necessary, moreover, in light of the historical purpose of Section 1442(a)(1). That provision, like its "statutory forebears" (*Mesa*, 489 U.S. at 125), was "enacted to maintain the supremacy of the laws of the United States." *Symes*, 286 U.S. at 517. Though originating in times of national crises, each provision reflected the broader judgment

[22] The primary end result of these developments, as concerns litigation challenging governmental conduct, was enactment of the Administrative Procedure Act in 1946. See *Attorney General's Manual on the Administrative Procedure Act* 9 (1947). But Congress also responded to these events in the Judicial Code enacted two years later. Section 451 of the revised Code added a comprehensive definition of the word "agency" for purposes of the Code. In addition, Section 1345 added the word "agency" so that the provision, as revised, granted federal courts original jurisdiction over "suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." This revision reflected the growth in the number of agencies authorized to sue. See 28 U.S.C. 1345 Revision Notes.

that "federal officers, *and indeed the federal government itself*, require the protection of a federal forum." *Willingham*, 395 U.S. at 407 (emphasis added). Section 1442(a)(1) can only afford that protection if it is construed—as a natural reading of the text permits—to authorize removal by federal agencies.

C. An Interpretation of Section 1442(a)(1) That Precluded Removal By Federal Agencies Would Produce Absurd Results and Should Therefore Be Rejected

In deciding whether our reading or petitioners' reading of Section 1442(a)(1) is to be preferred, it is significant that petitioners' reading would produce results squarely at odds with the purpose underlying that provision. See *United States* v. *Brown*, 333 U.S. 18, 27 (1948).

For example, petitioners' interpretation would preclude removal in this case merely because petitioners named NIH as a defendant rather than the individuals against whom they sought and were granted relief. Although petitioners named NIH as the only federal defendant, they requested, and obtained, an injunction against both NIH and its "agents, attorneys, and servants" (Pet. App. A16). The injunction thus restrained actions by officers and employees of NIH "under color of * * * office" (28 U.S.C. 1442 (a)(1)), and exposed these individuals to contempt sanctions if they took the prohibited actions. Despite its caption, therefore, petitioners' suit was "[a] civil action * * * commenced in a State court against * * * officer[s] of the United States" (28 U.S.C. 1442(a)(1)). Congress surely did not intend removal of this case to be precluded solely by virtue of petitioners' artful pleading.

Moreover, petitioners' naming of NIH as defendant was improper. The general rule is that an agency cannot be sued in its own name absent congressional authorization. *Blackmar* v. *Guerre*, 342 U.S. 512, 514-515 (1952). Congress granted no such authority here. In addition, petitioners' state court action was plainly barred by sovereign immunity. See, *e.g.*, *Dugan* v. *Rank*, 372 U.S. 609 (1963). A waiver of sovereign immunity in the Administrative Procedure Act might apply to the activities of NIH, see 5 U.S.C. 702, but the waiver is expressly limited to actions brought in federal court.[23] For these reasons, interpreting Section 1442(a)(1) to bar removal in this and similar cases would reward plaintiffs for challenging actions of the federal government through suits brought in the wrong court against the wrong party. Such an absurd result tips sharply against adopting such an interpretation.

The incongruous results that would flow from such an interpretation are not limited to cases challenging agency activities that are immune from state court review. There are numerous governmental bodies—many of which are "agenc[ies]" as that term is defined for purposes of Section 1442(a)(1), see 28 U.S.C. 451, *supra* note 12—whose operations may be

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[23] See *Aminoil, U.S.A., Inc.* v. *California State Water Resources Control Bd.*, 674 F.2d 1227, 1233 (9th Cir. 1982) ("[T]he waiver of sovereign immunity in section 702 is expressly limited to actions brought 'in a court of the United States . . . .' The legislative history demonstrates that section 702 was not intended to effect a waiver of sovereign immunity for suits against the United States or its officers in state courts. 'The consent to suit is also limited to claims in the courts of the United States; hence, the United States remains immune from suit in state courts.' H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 11 (1976).").

the subject of state court attack pursuant to "sue and be sued" clauses. Some of these clauses provide for suits naming the agency, others for suits against the head of the agency.[24] Nothing in the text of these various provisions suggests that Congress intended to allow removal only with respect to suits of the

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[24] See, *e.g.*, 7 U.S.C. 942(b) (Rural Telephone Bank); 12 U.S.C. 1441(c)(8) (Federal Home Loan Bank Financing Corporation); 12 U.S.C. 1702 (Secretary of HUD with respect to certain statutory duties); 12 U.S.C. 2289(1) (Federal Financing Bank); 12 U.S.C. 3012(6) (National Consumer Cooperative Bank); 15 U.S.C. 77dd (Corporation of Foreign Security Holders); 15 U.S.C. 78ccc(b)(1) (Securities Investor Protection Corporation); 15 U.S.C. 634(b)(1) (Administrator of Small Business Administration); 16 U.S.C. 648c(b) (National Trust for Historic Preservation); 16 U.S.C. 831c(b) (Tennessee Valley Authority); 19 U.S.C. 2350 (Secretary of Labor with respect to trade adjustment assistance for firms); 20 U.S.C. 1132g-1(c)(2) (Secretary of Education with respect to housing and educational facility loans); 20 U.S.C. 3225(d)(3) (National Trust for Drug-Free Youth); 20 U.S.C. 4414(a)(3) (Board of Institute of American Indian and Alaska Native Culture and Arts Development); 22 U.S.C. 2199(d) (Overseas Private Investment Corporation); 22 U.S.C. 4604(j) (United States Institute for Peace); 25 U.S.C. 1496(a) (Secretary of Interior with respect to federal loan guarantees and related insurance for Native Americans); 33 U.S.C. 984(a)(3) (St. Lawrence Seaway Development Corporation); 38 U.S.C. 1820(a)(1) (Administrator of Veterans' Affairs with respect to housing and small business loans); 42 U.S.C. 294h(a)(2) (Secretary of Health and Human Services with respect to federally insured loans to graduate students in health professions schools); 42 U.S.C. 1404a (Secretary of HUD with respect to low-income housing); 42 U.S.C. 8105(b)(4) (Neighborhood Reinvestment Corporation); 45 U.S.C. 822(c)(5) (Secretary of Transportation with respect to Railroad Rehabilitation and Improvement Fund).

latter type.[25] Nor would such a result be logical. As in this case, state court suits for injunctive relief under any of these sue-and-be-sued clauses would, if successful, bind both the agencies and their officers. Cf. Fed. R. Civ. P. 65(d).[26]

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[25] In creating some governmental entities, Congress expressly provided for removal of actions against them. See, *e.g.*, 12 U.S.C. 632 (federal reserve banks); 12 U.S.C. 1452(e) (Federal Home Loan Mortgage Corporation); 12 U.S.C. 1730(k) (Federal Savings and Loan Insurance Corporation); 12 U.S.C. 1789(a)(2) (National Credit Union Administration Board); 12 U.S.C. 1819 (Federal Deposit Insurance Corporation); 12 U.S.C. 2277a-7(4)(B) (Farm Credit System Insurance Corporation); 12 U.S.C. 2278b-4(b) (Farm Credit System Financial Assistance Corporation); 12 U.S.C. 2279aa-14(3) (Federal Agricultural Mortgage Corporation); 22 U.S.C. 282f (International Finance Corporation); 22 U.S.C. 283f (Inter-American Development Bank); 22 U.S.C. 283gg (Inter-American Investment Corporation); 22 U.S.C. 284f (International Development Association); 22 U.S.C. 285f (Asian Development Bank); 22 U.S.C. 286g (International Monetary Fund and International Bank for Reconstruction and Development); 39 U.S.C. 401(1) (United States Postal Service). Most of these entities are corporations or other entities with respect to which, in the absence of a specific removal provision, doubt could arise as to whether they were "agenc[ies]" for purposes of 28 U.S.C. 451, and so entitled to invoke Section 1442(a)(1). See also 28 U.S.C. 1349 (regarding original jurisdiction over cases involving government corporations).

[26] See also La. Code Civ. Proc. Ann. tit. 1 ch. 2, art. 3605 (West 1961) (injunction "shall be effective against the parties restrained, their agents, employees, and counsel, and those persons in active concert or participation with them"); *Pettus v. Atchafalaya Wildlife Protective Society*, 351 So. 2d 790, 792 (La. Ct. App. 1977) ("An injunction [against] a corporation is a mandate to those responsible for the * * * corporation's affairs.").

There is a third category of cases in which interpreting Section 1442(a)(1) to preclude removal by federal agencies would produce absurd results. In several major environmental statutes, Congress has, under certain circumstances, waived the federal government's sovereign immunity from state environmental laws.[27] These provisions clearly contemplate state court suits against federal "agenc[ies]" within the meaning of Section 1442(a)(1). Many such suits will no doubt allege exclusively state-law claims and therefore fall outside the general removal provision, 28 U.S.C. 1441. Nonetheless, these suits will invariably raise important and sensitive issues regarding, for example, the scope of the waiver and the extent to which state requirements have been preempted. It is inconceivable that Congress intended to confide the resolution of such issues largely to the courts of the 50 States. Cf. *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 147 (1971) ("For the Federal Government and its agencies, the federal courts are the forum of choice.").[28]

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[27] Clean Water Act, 33 U.S.C. 1323(a); Safe Drinking Water Act, 42 U.S.C. 300j-6; Clean Air Act, 42 U.S.C. 7418(a); Resource Conservation and Recovery Act, 42 U.S.C. 6961 (solid and hazardous wastes); 42 U.S.C. 6991f (underground storage tanks); 42 U.S.C. 6992e (medical wastes); and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9620.

[28] Only one of these environmental statutes' waiver provisions, the Clean Water Act's, addresses removal:

> Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 *et seq.* of title 28. * * *

33 U.S.C. 1323(a).

Moreover, in two of these environmental statutes—the Clean Air Act (42 U.S.C. 7418(a)) and the Clean Water Act (33 U.S.C. 1323(a))—Congress expressly subjected to state requirements not only every "department, agency, or instrumentality" of the federal government but also every "officer, agent, or employee thereof." If Section 1442(a)(1) were read to preclude removal by federal agencies, the removability of most state court actions under these statutes would rest exclusively in the hands of plaintiffs, since they would have the choice of naming the agency or its head.[29]

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[29] For example, in two recent cases, the Pennsylvania Department of Environmental Resources (PADER) sued federal agencies alleging violations of the State's environmental laws. *PADER* v. *United States Dep't of the Navy*, Civ. No. 89-0545 (M.D. Pa. Aug. 29, 1989) (concerning cleanup of hazardous waste at a Navy facility in Mechanicsburg, Pennsylvania); *PADER* v. *Small Business Administration*, 579 A.2d 1001 (Pa. Commw. 1990) (concerning cleanup of former wallpaper factory that SBA acquired in connection with a loan guarantee). Both cases presented important issues as to the scope of the corresponding federal waiver provisions and under the Supremacy Clause. Accordingly, in each case the United States removed the action, only to have it remanded to state court. *PADER* v. *Navy*, Civ. No. 89-0545 (order filed Aug. 29, 1989); *PADER* v. *SBA*, Civ. No. 89-3954 (order filed Jan. 19, 1990). After remand in *PADER* v. *Navy*, the United States filed an action in federal court for declaratory relief, alleging, as it had in the state court proceeding, that the state court proceeding was barred by sovereign immunity and under CERCLA. See *United States* v. *PADER*, No. 90-5337 (3d Cir. Jan. 22, 1991), slip

In sum, interpreting Section 1442(a)(1) to authorize removal only by federal officers would lead to results that are "at war" with the purpose of the statute. Cf. *United States* v. *Campos-Serrano*, 404 U.S. 293, 298 (1971). The results of such an interpretation, moreover, would be far-ranging, affecting every aspect of the government's operation that is carried out through federal agencies. Finally, such an interpretation could significantly alter the balance of federal-state relations and contribute to divisiveness in those relations. For these reasons, that interpretation should be rejected.

D. Interpreting Section 1442(a)(1) To Authorize Removal By Federal Agencies Accords With This Court's Decisions Concerning Suits Against the Federal Government

At bottom, the interpretation of Section 1442 (a)(1) championed by petitioners rests on a distinction between actions by officers of an agency and actions by the agency itself—a wholly artificial distinction in this context. As explained above, Congress has eschewed such a distinction in certain statutes prescribing the circumstances under which the operation of the federal government can be judicially challenged. This Court has likewise refused to draw such a distinction where, as here, doing so would clearly thwart congressional purpose.

In *Loeffler* v. *Frank*, 486 U.S. 549, 551 (1988), the Court held that "prejudgment interest may be

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op. 4-5. The Third Circuit reversed the district court's dismissal of the United States' action, holding that the lower court abused its discretion by according insufficient weight to the United States' "compelling interest in adjudicating its sovereign immunity under federal statutes in a federal forum." *Id.* at 3.

awarded in a suit against the United States Postal Service brought under Title VII of the Civil Rights Act of 1964, * * * 42 U.S.C. 2000e *et seq.*" The Court based this holding on 39 U.S.C. 401(1), which empowers the Postal Service "to sue and be sued in its official name." See *Loeffler*, 486 U.S. at 554-558. The Court rejected the argument that this provision did not apply in Title VII suits, in which Congress required that "the *head* of the department, agency, or unit * * * shall be the defendant" (42 U.S.C. 2000e-16(c)) (emphasis added). 486 U.S. at 562 n.8. The fact that the plaintiff properly named the head of the Postal Service did not preclude him from enjoying the benefits of the provision authorizing suits against the Postal Service "in its official name." *Ibid.*

In rejecting the distinction between suits against an agency and suits against the head of the agency, the Court in *Loeffler* relied on *FHA* v. *Burr*, 309 U.S. 242 (1940). In *Burr*, the Court interpreted the "sue and be sued" clause applicable to the *Administrator* of the FHA to authorize garnishment of the *agency's* assets. *Id.* at 249-250. Although *Burr* presented the "inverse situation" of that presented in *Loeffler*—i.e., the agency was the named defendant, and the statute at issue referred to the agency head—"the same logic applies. * * * [T]he acts of the named defendant are always chargeable as acts of the person or entity" subject to the statute. *Loeffler*, 486 U.S. at 563 n.8.

A similar approach is warranted here. The Court in *Loeffler* and *Burr* was guided by the principle that the statute before it in each case was to be construed broadly in light of its purpose. *Loeffler*, 486 U.S. at 556; *Burr*, 309 U.S. at 245. So too here, the purpose

of Section 1442(a)(1) to afford the federal government the protection of a federal forum "should not be frustrated by a narrow, grudging interpretation." *Willingham*, 395 U.S. at 407. As we have explained, that purpose would clearly be thwarted by an interpretation that made the availability of a federal forum depend on whether the suit named the agency or its officers. The distinction rejected in *Loeffler* and *Burr* should also be rejected here.[30]

II. PETITIONERS' ARGUMENTS REGARDING RES JUDICATA AND NIH'S INTEREST IN THIS CASE ARE NOT BEFORE THIS COURT AND ARE IN ANY EVENT WITHOUT MERIT

Petitioners advance two arguments that are unrelated to the question on which this Court granted review and that are in any event without merit. They argue first (Pet. Br. 17-19) that the issue of removal in this case is *res judicata* and, second (Pet. Br. 19-23), that the court of appeals below improperly held

[30] This approach also accords with that dictated by modern pleading practice, as embodied in the Federal Rules of Civil Procedure. The Rules recognize that suits against government officials are, in reality, suits against the office. See Fed. R. Civ. P. 25(d). Moreover, they authorize courts to look beyond the pleadings when necessary to determine the real parties in interest in the case and to require they be made a part of the case. Fed. R. Civ. P. 17(a). The addition of the real party in interest has "the same effect as if the action had been commenced in the name of the real party in interest." *Ibid.* Applied here, these rules would justify the courts in this and similar cases in treating the officers subject to the relief sought as the real parties in interest and, on this basis, upholding the removal of such cases. See Fed. R. Civ. P. 81(c) (Federal Rules of Civil Procedure apply to removed cases).

that NIH had a sufficient interest in this case to remove it.

A. The Fourth Circuit's Decision In *IPPL* v. *Institute for Behavioral Research* Does Not Preclude Litigation Of The Removal Issue In This Case

Petitioners contend (Pet. Br. 17-19) that litigation of the removal issue in the present case is barred by the Fourth Circuit's decision in *IPPL* v. *Institute for Behavioral Research*, 799 F.2d 934 (1986), cert. denied, 481 U.S. 1004 (1987). While petitioners invoke the doctrine of *res judicata*, their contention—that the issue of removal jurisdiction was implicitly decided in *IPPL*—actually rests on the doctrine of collateral estoppel, or issue preclusion. See *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 467 n.6 (1982). True *res judicata*, or claim preclusion, does not apply in actions dismissed for lack of jurisdiction, for in such actions the merits of the claims are not addressed. *Hughes* v. *United States*, 71 U.S. (4 Wall.) 232, 237 (1866); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4436 (1981). In any event, petitioners' contention that litigation of the removal issue in the present case is precluded is incorrect.

The preclusive effect of a prior decision extends only to issues that were "actually litigated and determined" and "essential to [the prior] judgment." *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 874 (1984). Thus, a prior judgment deciding one issue of jurisdiction does not preclude later litigation of a different jurisdictional issue. See, *e.g.*, *GAF Corp.* v. *United States*, 818 F.2d 901, 913 (D.C. Cir. 1987); *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983) (relitigation barred "at least to the extent appellant seeks to base jurisdiction on [28 U.S.C.

1332]."); *Stewart Securities Corp.* v. *Guaranty Trust Co.*, 597 F.2d 240, 241 (10th Cir. 1979) ("the doctrine of *res judicata* precludes a subsequent relitigation *of the same jurisdictional issue* between the parties.") (emphasis added).

The issue presented here—whether NIH could remove a state court suit under Section 1442(a)—was neither raised nor necessarily decided in *IPPL*. In *IPPL*, petitioners presented a federal claim as well as state-law claims. The case was therefore removable under 28 U.S.C. 1141, and NIH removed it without opposition. 799 F.2d at 937. Neither party raised the issue of removal under Section 1442, and the court of appeals did not discuss it. Rather, after dismissing petitioners' federal claim, the court merely declined to exercise pendent jurisdiction over the state law claims on the ground that "state claims should usually be dismissed if the federal claims have been dismissed before trial." *Id.* at 941 (citing *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1966)). The Fourth Circuit's decision to deny pendent jurisdiction cannot reasonably be interpreted as an implicit ruling on an entirely separate issue of removal jurisdiction that was not presented to the court.

B. NIH Had A Sufficient Interest In This Case To Remove It

Petitioners contend that NIH's interest in this case was too attenuated for it to remove this case. But petitioners do not dispute that this suit was "commenced against" NIH for purposes of Section 1442(a)(1). Nor do they dispute that NIH alleged federal defenses that satisfied the "under color of * * * office" requirement of that provision. See *Mesa*, 489

U.S. at 129-134. Thus, the legal basis for petitioners' view that something more is required to invoke Section 1442(a)(1) is obscure; they cite no statutory provision or case law to support this view. In any event, NIH plainly has a substantial interest in this case.

Petitioners' own conduct in this case defeats their contention that NIH's interest in this case is insufficient. They voluntarily named NIH as a defendant in this case. They devoted their complaint to allegations of misconduct by NIH with regard to the care and custody of the monkeys. They repeat these allegations in the statement section of their brief to this Court. Finally, they have sought injunctive relief directly against NIH, its employees, and its agents.

In addition, NIH's interest in this case is clear from its statutory mandate. 42 U.S.C. 281-284c, 289-290a. The research by IBR that sparked the present controversy was "research * * * supported by [NIH]" (42 U.S.C. 241, 282(b)(3)) that must comply with regulations and guidelines promulgated by the Director of NIH governing, among other things, the care and custody of research animals (42 U.S.C. 289-289b, 289d). The planned euthanasia that petitioners have sought to enjoin likewise is subject to these guidelines and is designed to provide the type of scientific information that NIH was created to foster. NIH clearly has a vital interest in any suit that, like this one, seeks to prevent it from carrying out its statutory mission.[31]

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[31] For this reason, petitioners' fact-bound contentions regarding which respondent had physical custody of the monkeys at various stages of this litigation are irrelevant. In any event, there was ample evidence in the record before the district establishing that NIH, at considerable expense, acted

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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as primary custodian of the monkeys after the monkeys were transferred to NIH in late 1981. See NIH App. 1a, 2a; IBR App. 6a.

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[redacted]

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

INTERNATIONAL PRIMATE PROTECTION LEAGUE
AND ITS MEMBERS, ET AL.
Petitioners,

v.

ADMINISTRATORS OF TULANE
EDUCATIONAL FUND, ET AL.
Respondents.

ON PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FILED ON BEHALF OF THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND

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QUESTION PRESENTED

1. Whether federal agencies may remove state court actions to federal courts pursuant to 28 U.S.C. 1442(a)(1).

NO. 90-89

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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AND ITS MEMBERS, ET AL
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V.

ADMINISTRATORS OF THE TULANE
EDUCATIONAL FUND, ET AL
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON THE MERITS ON BEHALF OF THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND

The respondent, Administrators of the Tulane Educational Fund, has reviewed the law and arguments contained in the briefs on the merits for the National Institute of Health (NIH) and the Institutes for Behavior Resources, Inc. (IBR). Having reviewed the briefs filed by NIH and IBR, the respondent, Administrators of the Tulane Educational Fund, hereby adopt and incorporate herein for reference the statement, law and arguments made by NIH and IBR as if they were its own. The court's attention is specifically directed to the case law and authorities cited in the brief filed by IBR which support our position that The Administrators of the Tulane Educational Fund is a juridical person entitled to remove under 28 U.S.C. §1442(a)(1). We submit that for purposes of this suit, where NIH contracted with Tulane's Delta Regional Primate Research Center to care for the Silver Spring monkeys and jointly conducted primate research, that it too is a "person" entitled to remove this action from state court to federal court under U.S.C. §1442(a)(1). We, therefore, embrace the arguments

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made by NIH and IBR that removal under U.S.C. §1442(a)(1) is proper where injunctive relief is specifically sought against a federal agency irrespective of whether petitioners have chosen to specifically identify individual federal officers of a federal agency in their petition for injunctive relief.

CONCLUSION

For the reasons stated in the briefs submitted by NIH and IBR, the opinion below should be affirmed.

Respectully submitted,

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CERTIFICATE

I hereby certify that a copy of the foregoing pleading has been served on counsel for all parties by placing same in the United States Mail, postage prepaid, addressed to their respective offices, this 11th day of February, 1991.

GREGORY C. WEISS

No. 90-89

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In The

Supreme Court of the United States

October Term, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS,

Petitioners,

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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ARGUMENT

A. State Courts have long been entrusted with federal questions and are competent to decide them.

Underlying most of Respondents' arguments in this case is a profound mistrust of the state courts' competence to adjudicate federal defenses. This fundamental suspicion runs counter to constitutional history and mainstream federalist thinking.

The framers of the original Constitution regarded the states as important – and in many ways as the primary – entities of government. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 491 (1954); Fallon, *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141, 1153 (1988). While delegating an enumerated set of functions to the national government, the framers left the states the "responsibility for dealing, and . . . [the] authority to deal, with the whole gamut of problems cast up out of the flux of everyday life." Hart, 54 Colum. L. Rev. at 491. Included among the states' responsibilities was their role as "the primary guarantors of constitutional rights." Hart & Weschler, *The Federal Courts and the Federal System* 339 (1953).

The federal courts are of limited, circumscribed jurisdiction. Only this Court has constitutional standing; the creation of all other federal courts was left to the discretion of Congress, as was the enumeration of their powers, within the confines of Article III of the Constitution. Hart & Weschler, at 10-11.[1] By contrast, the state courts are repositories of general jurisdiction, conferred upon them not by Congress, but by the sovereign people of the respective states. *Id.* and Arnold, *The Power of State*

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[1] The constitutional debate over whether federal trial courts should be created at all, because they might unduly interfere with the jurisdiction of state courts, was resolved by the "Madisonian Compromise," leaving creation of the lower federal courts to the discretion of Congress. *Id.*

Courts to Enjoin Federal Officers, 73 Yale L. J. 1385, 1398 (1964). Absent an explicit prohibition by Congress, state courts were, and are, to have concurrent jurisdiction in all cases arising under the laws of the United States. These principles were enumerated by Alexander Hamilton in Number LXXXII of *The Federalist*, in a passage repeatedly approved by this Court:[2]

> I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

[2] 2 *The Federalist* 130, 132 (Bourne ed. 1901). *See, e.g., Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508, n.5 (1962); *Claflin v. Houseman*, 93 U.S. 130, 138 (1877); *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 25-26 (1820).

It was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction. Act of Mar. 3, 1875, §1, 18 Stat 470. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807 (1986). Under that legislation, a large body of federal issues continue to be adjudicated by state courts, including those arising under state law in which a federal defense is asserted or a federal issue is presented as an element of a state claim. *Id.*

In these and in the host of other cases in which state courts confront federal questions, they are bound by the supremacy clause, which states that the Constitution, laws, and treaties of the United States "shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI.

Thus, the state courts would be obligated to uphold any legitimate federal defense asserted by Respondents. Their implicit suggestion that the state courts cannot or will not properly discharge that function is in direct conflict with "this Court's emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, **and its expression of confidence in their ability to do so.**" *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (emphasis supplied) and cases cited therein.

Because the Constitution presupposes the state courts' fitness to adjudicate federal issues and the federal courts may only relieve the state courts of jurisdiction by express statutory direction, the federal officers removal statute should only be read to apply to NIH or Tulane if it clearly so provides. As discussed below, Respondents

have struggled to create ambiguity in the statutory language and history, and hope to extract from that ambiguity an expansive reading of the statute. But the fact of the ambiguity alone defeats their argument, for federal courts, as courts of limited jurisdiction, cannot expand their jurisdiction except by clear, Congressional mandate. In the words of 28 U.S.C. §1441(a): "Except as **expressly** provided by Act of Congress" a case is not properly removed to federal court unless it might have been brought there originally. (emphasis supplied). *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 848 (1989).

B. The statutory language and history do not support Respondents' arguments.

Respondents' arguments concerning the interpretation of 28 U.S.C. §1442(a) have been reviewed and dismissed by the majority of courts that have considered them, leading to a consensus, from which the Fifth Circuit has deviated, that this provision concerns the right of removal by federal *officers* and not by federal agencies. These courts have noted that respondents' proffered interpretation distorts the language of the statute, ignores its title, glosses over or misinterprets its history and calls for a redirection of policy that should come from the legislature and not from the courts.

Petitioners' Brief on the Merits noted that most of the circuit court cases cited by Respondents are not dispositive or helpful to the resolution of this issue, as removal was not challenged. *See Harlem River Produce Co. v. Aetna Casualty & Sur. Co.*, 257 F. Supp. 160, 163 n.2 (S.D.N.Y. 1965) ("since the removal petitions in those cases were not contested, their value in determining the instant question is minimal.") Others did not address whether removal was available to federal officers and not to federal agencies, but whether suits could be removed by "private persons . . . who act under the direction of federal officers," *Camacho v. Autoridad de Telephonos de*

Puerto Rico, 868 F.2d 482, 486 (1st Cir. 1989), or accepted the government's unopposed view that a suit brought against an agency "should be deemed as one brought against" that agency's director. *Johnson v. Showers*, 747 F.2d 1228, 1229 (8th Cir. 1984).

Petitioners reiterate their argument that the language, syntax and punctuation of the statute indicate that a federal agency does not have the right to remove. Courts have previously considered the arguments for this right to be extended to agencies and have rejected this appeal and the reliance on cases cited by respondents. For example, *KCPO Employees Credit Union v. Mitchell*, 421 F. Supp. 1327, 1329-30 (W.D. Mo. 1976) focused the discussion correctly:

> The question in this case is not whether Section 1442(a)(1), the federal officer removal statute, is to be given a "narrow" or a "limited" construction, see *Colorado v. Symes*, 286 U.S. 510, 517, 52 S.Ct. 635, 76 L.Ed. 1253 (1932), or whether Section 1442(a)(1) should be given a "narrow, grudging interpretation," *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed. 396 (1969). The question presented is simply whether Section 1442(a)(1), the federal officer removal statute, can be read as conferring a right of removal on "any agency" of the United States.

Rejecting the "authority" for expanding the scope of the statute, the court concluded that "§1442(a)(1) simply cannot be given such a tortured reading." *Id.* at 1330. *Lowe v. Norfolk & Western Ry. Co.*, 529 F. Supp. 491, 494 n.1 (S.D. Ill. 1982), reached a similar conclusion by rejecting the applicability of *Willingham*, "since the question here is whether the explicit language of the statute confers the right of removal in the first instance." The court has to determine the "threshold question" of "whether an 'officer' includes the agency itself," *id.*, a proposition that the *Lowe* court rejected.

Respondents' arguments concerning interpretation of the statute in light of legislative history also fail (NIH

Brief at 16). The *KCPO* court noted that *Willingham*, 395 U.S. at 407 and *Symes*, 286 U.S. at 517, do not aid Respondents' arguments. Respondents ask the Court to note that "the statutory title is not a reliable guide to interpretation" (NIH Brief at 17 n.10) and that "[d]espite its title, the scope of §1442 clearly is not limited to actions against federal officers." Even though a statute's clear title is not always definitive of its content, NIH goes too far in suggesting that because the different sections of §1442(a) address removal in various situations, "Congress intended to allow removal of the broad array of governmental actions taken under color of office." *Id.* Respondents neglect to note that all the provisions concern *officers* or those holding rights derivatively from *officers*. For this reason, *Willingham* urged a construction of the statute "to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." 395 U.S. at 406-07. There is no mention of any right of removal for agencies in the statute, and the provisions of the statute should not be strained to provide for such a right.

Respondents argue that because an officer of an agency of the United States is an officer of the United States, our reading of the statute renders redundant the phrase "or any agency thereof" in the statute's allowance of removal by "any officer of the United States or any agency thereof". However, when the statute was enacted in 1948, following the creation of a host of new agencies, the added clause may have been thought necessary to emphasize that the right of removal was being extended not only to officers of the executive branch but also to those of independent agencies.

Congressional intent must surely be discerned from the face of the statute in light of its legislative history. Respondents believe that the legislative history is ambiguous and, like their misinterpretation of the statute itself, that it allows for the possibility that Congress drafted a statute to allow agencies to remove. The Reviser's Notes

suggest no such thing, only that whereas "§76 of Title 78, was limited to revenue officers engaged in the enforcement of the criminal or revenue laws", the revised section "is extended to apply to all officers and employees of the United States or any agency thereof." This was a broadening of the categories of officers covered; had Congress intended to create a new right of removal for federal agencies, surely the drafters would have addressed so significant a change in the Notes.

Respondent NIH insists that as the statute was revised at a time when there were increased opportunities to sue federal agencies in state court, the changes in the federal *officer* removal statute must be read to include agencies' right of removal. It is not sufficient to suggest what Congress might have done with reference to social context when Congress failed to make such a change in the removal statute.

NIH also looks to 28 U.S.C. §1345, to show that federal agencies by that time could sue or be sued, and thereby suggests that agencies should be entitled to remove to federal court. This section directly contradicts the position for which it is cited by NIH. It shows that Congress knows when to add the word "agency" to give it the grammatical purpose that respondents ascribe to it in §1442(a)(1). The Reviser states that the

> Word "agency" was inserted in order that this section shall apply to actions by agencies of the Government.

No such explanation is given in the Notes to §1442(a).

> The provisions of §1345 apply to
> all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof

thereby indicating that Congress knew where to place a comma or how to use a prepositional phrase in order to include an agency itself within the ambit of a statute. Respondents wish to point to §1345 as a clear indication of the inclusion of agencies, but would have Congress

mired in ambiguity and obfuscation when it came to section 1442, although both sections' revisions were passed into law on June 25, 1948.

Respondents may have policy arguments that might be appealing to Congress, but it would be for Congress to make further changes in the statute.[3] The majority of courts have decided that they should not make such changes on behalf of Congress by including an agency's right of removal under §1442(a)(1). Respondents argue that, even if the statute cannot be construed to give agencies a right of removal, NIH is a person acting under a federal officer, tracing the chain of command from the Director of NIH to the Secretary of Health and Human Services to the President himself. The interpretation of the word "person" is determined by the intent of the legislature as expressed in the statute at issue, on an essentially *ad hoc* basis. In this case, it simply strains the language and derivation of the statute to conclude that Congress accorded a right of removal to agencies in so obscure and indirect a fashion.

IBR and Tulane argue that Tulane also is a "person" acting under an officer of the United States, and thus enjoys an independent right of removal under §1442(a). Cases supporting such an interpretation, some purposely, many unwittingly, are collected at page 35 of IBR's brief.[4]

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[3] Congress has adverted to the possibility of agency removal in certain statutes, suggesting both that Congress does not construe section 1442 to provide a general right of agency removal, and that it only considers such a right necessary in limited circumstances. *See* NIH Brief at 29 n.25.

[4] IBR's ostensibly thorough survey failed to reveal any of the cases refusing to adopt so expansive an interpretation of the statute. *See, e.g., Maine Ass'n of Interdependent Neighborhoods v. Commissioner of Maine Dep't of Human Services*, 876 F.2d 1051 (1st Cir. 1989); *McGlynn v. Employers Commercial Union Ins. Co. of America*, 386 F. Supp. 774 (D.P.R. 1974).

As a body, the cases cited by IBR construe "person" under §1442(a) to include any individual or entity acting "under", "with", or "on the advice or suggestion of" a federal officer. Such a broad construction embraces a far larger body of cases than those in which claims are asserted directly against federal officers or agencies; its possible limits are difficult to decipher. Indeed, it would seem to embrace virtually every case in which a sovereign immunity defense, and perhaps many other federal defenses, were asserted, because there would always be some relationship to a federal officer from which the asserted defense flowed. Those cases of the group that have squarely addressed the proper construction of the statute follow the reasoning of *Allen v. Allen*, 291 F. Supp. 312, 313 (S.D. Iowa 1968), which permitted removal by the Iowa Medical Service, on the theory that "[s]ound policy requires the availability of a federal forum for adjudication of the legal status of **persons who colorably have been acting under federal direction.**" (emphasis supplied). *Allen* concluded that because Congress had "steadily enlarged" §1442(a) removal, while otherwise restricting federal removal jurisdiction, §1442(a) "is not to be given a strict interpretation." *Id.* Such reasoning violates first principles requiring strict construction of jurisdictional statutes.

To put by the compass of the statutory language would be to follow Respondents into a maze of countless claims whose limits cannot be discerned. *Cf., Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936). Strictly construed, §1442(a) provides a right of removal only for persons, such as employees, working "under" a federal officer, and not for anyone "colorably . . . acting under federal direction." Neither Tulane nor IBR would fit within its reach.

It is Petitioners' argument that the Fifth Circuit has misinterpreted or ignored the language and legislative history of this statute, and the persuasive analysis of the majority of courts, which afford a right of removal to

federal officers, but not to federal agencies or their business colleagues.

C. Federal interests will not be impaired by a remand of this case to state court.

NIH's argument that plaintiffs sued "the wrong party in the wrong court" begs the real question. The question presented by this case is whether the federal courts may exercise removal jurisdiction over an action brought against an agency in state court. Even if the answer is affirmative this is not to say, in fairness, that the state court was the "wrong" court. Indeed, the state law claims could only have been brought in state court, and removal would only be proper if the state court were the "right" court, enjoying jurisdiction that could be transferred to the federal court.[5] And whether NIH is "the wrong party" is a sovereign immunity question – the precise federal question to be decided in either state or federal court **after** the jurisdictional issue is decided. If there

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[5] *See Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841 (1983); *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382, 42 S.Ct. 349, 351 (1922). The derivative nature of federal removal jurisdiction raises a question whether removal was proper in this case. Because NIH was not served in state court (later accepting service in federal court), the state court did not have jurisdiction over NIH. If the NIH's sovereign immunity defense is considered jurisdictional, *see Lambert Run Coal Co., supra*, the state court may also have lacked subject-matter jurisdiction over the claims against NIH. *But compare, Brooks v. Dewar*, 313 U.S. 354, 360 (1941); *Wheeldin v. Wheeler*, 373 U.S. 647, 664 n.13 (1963) (dissenting opinion of Brennan, J.), suggesting that sovereign immunity may not be a jurisdictional defense. *See also* 28 U.S.C. §1441(e) (eliminating any derivative jurisdictional defect relating to the *claim*). If, however, the state court lacked jurisdiction over NIH, the federal district court may not have derivatively acquired jurisdiction by removal.

were no sovereign immunity issue, then regardless of the agency's right to remove under §1442(a), there could be no removal here under *Mesa v. California*, 489 U.S. 121, 129 (1989), which established that "federal officer removal must be predicated on the allegation of a colorable federal defense."[6]

If the cart could be put before the horse as NIH urges, the fact that plaintiffs may have sued "the wrong party" (the agency), would not convert this into a suit against "the right party" (an officer). Rather, if sovereign immunity were a legitimate defense, it would bar the plaintiffs' action against both NIH **and** its officers. Therefore, if the cart were placed before the horse, it would have to be advanced to a position where neither a federal officer nor a federal agency were properly sued. Only state claims against private parties would then remain and there could be no question that state court was the "right" court.[7] This, however, is the wrong analysis. Unless NIH's sovereign immunity defense is considered a jurisdictional issue, *see* note 4, *supra*, it could not properly be addressed until the jurisdictional issue raised under §1442(a) was decided.[8] Respondents' argument that the

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[6] The instant case was removed before the *Mesa* decision was handed down. NIH filed successive removal petitions, none of which asserted the presence of a colorable federal defense. Shortly after the case was removed, however, NIH filed successive motions to dismiss, asserting a host of federal defenses, some of which were patently frivolous and all of which were rejected, save the standing argument, which was upheld by the Fifth Circuit. Before this Court, NIH asserts only the sovereign immunity defense and standing argument.

[7] . . . Unless this Court adopted the argument that Tulane was a "person acting under" an officer of the United States, enjoying an independent right to remove.

[8] Jurisdictional issues must always be resolved first. NIH's argument, in fn. 4 of its brief, that this Court has no jurisdiction to entertain the jurisdictional issue under §1442(a) because

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state court is the wrong court to decide the immunity issue presupposes both an ambiguity in the removal statute and a policy favoring determination of immunity questions in federal court. As noted in the preceding section, Respondents are wrong in their first presupposition. They are also wrong in their second.

Under the Supremacy Clause, state courts have a constitutional obligation to uphold federal law, and this Court has repeatedly expressed its confidence in their ability to do so. *Allen v. McCurry*, 449 U.S. at 105. Nor is the immunity defense raised by Respondents a novel one for the federal courts to entrust to state courts. In *Gully v. First National Bank*, 299 U.S. 109 (1936), the Mississippi State tax collector sought to recover in state court state taxes levied against a national banking association. The defendant removed the case to federal court, claiming that it arose "under the constitution or laws of the United States" because the state tax laid upon the national bank was impermissible under federal law. Referring to this dispute as "doubtful and conjectural," the Court found it "unavailing to extinguish the jurisdiction of the states." *Id.* at 117. Speaking for the majority, Justice Cardozo wrote:

> The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government.

Id. Gully elevated the underlying issue of state power in our federal form of government over the issue of federal

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Petitioners' allegedly lacked Article III standing to sue is fallacious. Obviously, Article III standing would not be required if the federal courts lacked removal jurisdiction; and this Court clearly has jurisdiction to determine its own jurisdiction. 13A Wright, Miller and Cooper *Federal Practice & Procedure* §3536 (1984).

immunity. More than fifty years later, this Court approved *Gully's* priorities, stating in *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989), involving a tribal immunity defense, "it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law."

While Section 1442(a) provides an extraordinary protection for federal **officers**, which allows their immunity defenses to be heard in federal court, it cannot be inferred from this that Congress intended **agency** immunity defenses to be heard in federal court as well. The same state courts that have been entrusted with the responsibility of adjudicating federal defenses in Section 1331 cases can certainly adjudicate them in cases where a federal agency has been sued. There is no sound policy reason for determining the states' capacity to decide a federal question depending on whether a federal agency is involved. The decision to provide a federal forum to a federal officer, an individual whom Congress feared could be subjected to personal harassment in state courts, does not logically compel a conclusion that Congress would offer a similar option to an agency, whose inevitable bureaucratic structure would offer substantial insulation against personal harassment.

NIH argues that the distinction Petitioners draw between officers and agencies is illusory in this injunction suit where NIH **and its officers** were enjoined from killing the Silver Spring Monkeys. Two interesting ironies inhere in this argument. First, the injunction against NIH and its officers was issued not by the state court, whose allegedly rapacious grasp defendants seek to avoid, but **by the federal court,** for whose "protection" they are clamoring. Pet. A-16. Second, the federal court that issued the injunction **rejected** the federal defenses that defendants claim only the federal court could be trusted to entertain fairly. Pet. A-17, A-18. In any event, the fact that

a suit against an agency results in an injunction binding on the agency's officers does not eliminate the distinction between a suit commenced against an agency as opposed to one commenced against an officer. Where the agency only is named as a defendant, an officer would only be directly and personally subjected to the state court's authority if he **violated** a court order. The same would be true if a federal officer violated a court order entered against a private entity or individual.[9]

NIH contends, however, that the plaintiff should not have the power to determine the forum by the simple – and in Respondents' view, meaningless – expedient of naming an agency instead of an officer. The plaintiff would not in actuality be determining the forum. His state-law claim(s) could only be brought in state court. He might, however, deprive a federal defendant of the option of removal depending upon whether he named a federal officer or a federal agency as a defendant. According such a jurisdiction-determining choice to a plaintiff is neither foreign nor inimical to the federal system. In the vast majority of cases in which defendants base removal on the alleged presence of a federal question[10], the allegations of the plaintiffs' well-pleaded complaint, and not the existence of federal defenses or underlying issues, determine the right of removal. The plaintiff, then, is the

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[9] If the federal, like the state, temporary restraining order had issued only against Tulane, and an NIH officer, acting as Tulane's agent, euthanized the monkeys in violation of the order, in that case too, the federal officer would be answerable to the state court, although there had been no order against the agency or its officers.

[10] An exception to the general rule is provided, for example, where federal law has preempted the area occupied by the plaintiff's state law claims. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). In this case NIH asserted in the district court a preemption claim that it did not reurge in the Fifth Circuit or before this Court.

master of his petition and of the jurisdictional consequences of the choices made in the petition. *See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986), and cases cited therein; *Great N. Ry. Co. v. Alexander*, 246 U.S. 276 (1918). There is nothing unseemly in the plaintiff's enjoying such an option.[11]

Similarly, in choosing to name a federal agency instead of its officers, the plaintiff may determine the forum. The choice of agency over officer will not necessarily be a meaningless one. Like the plaintiff who drafts his petition to forego a federal claim, the plaintiff who names an agency instead of an officer may forego certain rights and remedies.[12]

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[11] The plaintiff also has a choice of forum in diversity cases. Where diversity of citizenship exists and the jurisdictional amount is in controversy, the plaintiff may file his state-law suit in state or federal court under 28 U.S.C. §1332. The defendants, however, do not enjoy as extensive a right of removal: removal will be defeated if any defendant is a citizen of the state in which the action was brought. 28 U.S.C. §1441(b).

[12] Respondents suggest that it is nonsensical to distinguish between the right of removal of an officer of an agency and that of the agency itself, because there are some instances where a statutory grant is afforded to sue an agency and other instances in which an officer of the agency is to be sued. Closer scrutiny of such instances reveals that the grant does not necessarily confer parallel or interchangeable abilities to sue. For example, Respondents point to 15 U.S.C. §634(b)(1), concerning the Small Business Administration. The enumerated powers of the agency are divided between the Administrator and the Administration, *id.* at 634(a). The Administrator may sue and be sued in state or federal court "[i]n the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter" *id.* at 634(b). The Small Business Administration "is not a separate 'sue and be sued' agency." *United States v. Skipper Smith's Marina, Inc.*, 283 F. Supp. 408,

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If an action brought by the plaintiff in state court is non-removable, the defendant raising federal issues is not unprotected. First, there is the state court's obligation to uphold federal law under the Supremacy Clause. Second, there is this Court's power to review the state court's decision of a federal issue. *See Merrell Dow Pharmaceuticals*, 478 U.S. at 816; *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S., 1, 12, n.12 (1983). Third, in extraordinary cases, the federal defense may be tested in federal court under the Declaratory Judgment Act, 28 U.S.C. §2201. *See, United States v. Pennsylvania Dep't of Envtl. Resources*, 923 F.2d 1071 (3d Cir. 1991).[13]

Therefore, not only does the statute fail to provide the right of removal Respondents exercised in this case,

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409 (S.D. Fla. 1968) and is "clothed with the same prerogatives or immunities of a sovereign except to the extent that they have been waived by statute." *United States v. Inciardi*, 258 F. Supp. 837, 839 (W.D. Okla. 1966).

[13] NIH cites this case, *sub nom., United States v. PADER*, as an illustration of the need for federal agencies to have access to the federal courts for the determination of federal defenses. The Navy brought the action in federal court, alleging that its sovereign immunity defense to an environmental suit brought in state court had not been properly adjudicated in that court. In deciding that discretionary jurisdiction under the Declaratory Judgment Act should be exercised, the Third Circuit emphasized the fact that state law permitted enforcement of the order issued against the Navy pending determination on the merits of the sovereign immunity defense. Had that not been the case, the court made clear, the existence of a pending action in state court where the federal defense could be adjudicated would have precluded the exercise of federal jurisdiction. *PADER* thus stands for the propositions that: 1) a federal forum is only necessary in the extraordinary case where state law precludes effective determination of a federal defense; and 2) a remedy is already provided for those extraordinary circumstances under the Declaratory Judgment Act, so that enlargement of §1442(a) is not required.

which militates against judicial inquiry into the soundness of the statutory policy, but also there is no compelling policy reason for creating a right of agency removal.

D. Sound policy reasons dictate the adjudication of state claims against an agency in state court.

In *Colorado v. Symes*, 286 U.S. 510, 518 (1932), the Court observed, "it is axiomatic that the right of the states, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it." *See also Arizona v. Manypenny*, 451 U.S. 232, 243 (1981). The removal statute, the *Symes* Court counseled, "is to be construed with highest regard for such equality."

Louisiana's interest in this case is beyond question. The suit was brought by local and national animal welfare groups, in state court and under state law, to protect animals within the state, housed in a state facility. The claims, grounded in Louisiana's public policy against cruelty to animals, local tort law, and equitable principles deriving from the Napoleonic Code, unquestionably fall within the peculiar bailiwick of Louisiana state courts. Weighed against the local nature of the dispute and causes of action is the interest of NIH – a party whose legal interest has been seriously disputed by both the Petitioners and the federal district court[14] – in plying its defense of sovereign immunity.

One of two results must flow from this Court's definitive interpretation of Section 1442(a): either the state courts must handle the federal immunity defense or the federal courts must handle the state claims. The state

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[14] *See* Section E at pp. 19-23 of Petitioners' Brief on the merits.

courts' competence to address federal issues was discussed in preceding sections. The prospect of the federal courts' handling state claims has received little attention in Respondents' briefs. As the present case demonstrates, there are serious problems inherent in the result Respondents advocate.

First, the federal issues are likely to be disposed of quickly, leaving behind only the fundamental state law claims. In the present case, this might have occurred in one of two ways: if the sovereign immunity defenses were upheld, resulting in a dismissal of the action against NIH, the federal court would be left with state claims against private parties, with no remaining federal issues. Similarly, if the sovereign immunity defenses were rejected, the federal court would be left with state claims and no viable federal issues. In either case, whatever interest the federal courts might have had in adjudicating the case would be quickly eviscerated. What then? In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), a divided Court determined that a federal court whose jurisdiction was based upon the existence of a federal claim that had been dismissed would have the discretion to remand state-law claims over which it had exercised pendent jurisdiction. Whether the same result would obtain in a case removed under Section 1442(a), after disposition of the federal defense(s), is unclear.[15] More certain is the wisdom of *Carnegie-Mellon's* recognition "that a federal court's determination of state-law claims could conflict with the principle of comity to the States and with the promotion of justice between the litigating

[15] In the decision below, the Fifth Circuit reasoned that because the right of removal under §1442(a) is "absolute", unlike removal under §1441, where the discovery of a jurisdictional defect would require remand, a plaintiff's lack of Article III standing required dismissal of his claims, not remand. 895 F.2d at 1061.

parties" 484 U.S. at 349-350. These difficulties would be particularly acute if remand were not available.

As the instant case revealed, however, other requirements peculiar to the federal court system may trench upon the principle of comity to the states and the promotion of justice between the litigating parties. Here, the issue of remand was never reached, even though the district court rejected NIH's sovereign immunity and other federal defenses. Nor could remand have been considered because Petitioners were found not to have met the requirements of standing imposed by Article III of the Constitution. No such requirements were imposed by Louisiana's more liberal standing doctrine. Thus, an action that could have been maintained in the state court where it was brought was dismissed by the federal court to which it was removed over the Petitioners' objection. Moreover, the action was dismissed for want of Article III standing despite the failure of the federal defense on which the removal depended. Indeed, had the district court addressed the jurisdictional issue of standing first, as the Fifth Circuit did, Petitioners' action might have been dismissed before the federal defenses could even be tested.

The harshness of this anomalous result is aggravated by the possibility that NIH has no legal interest in the case and hence that its sovereign immunity defense is unfounded – or worse, fraudulent. This possibility presses for a clarification of precisely what *Mesa* meant by its declaration that "federal officer removal must be predicated on the allegation of a **colorable** federal defense." 489 U.S. at 129 (emphasis supplied). As *Mesa* recognized, the requirement of a "colorable" federal defense is one of Constitutional stature: Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution, *id.* at 136 and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983); and the presence of a colorable federal defense supports Article III "arising under" jurisdiction for cases

removed under §1442(a). *Mesa v. California*, 489 U.S. at 136. To premise jurisdiction on a frivolous or fraudulent federal defense may be to strain the statute beyond its constitutional limit.

Respondents are stretching the language and perhaps the constitutional underpinnings of Section 1442(a) to their limits, all to the end that plaintiffs will be denied any hearing, in state or federal court, on claims brought in state court under state law to enforce state public policy. Respondents' reading of the statute does violence to principles of comity and fairness to the litigants, only to spare NIH the professed discomfort of litigating in state court issues the state court is competent to determine.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeal should be reversed, and the case remanded to the district court for purposes of remand to the state court.

Respectfully submitted,

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